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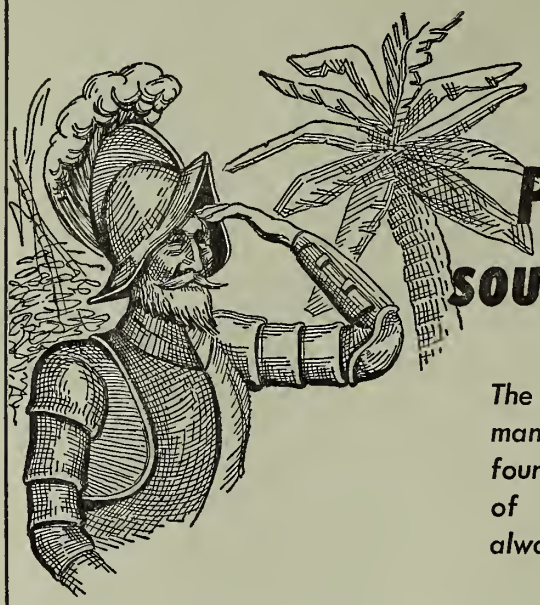

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Mississippi Law Journal

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SOME OBSERVATIONS ON OUR JUDICIAL SYSTEM

*Joel W. Bunkley**

It is the purpose of this article to discuss several problems which arise out of our present judicial system. None of these problems is new. None is peculiar to Mississippi. In discussing each problem it should be borne in mind that the question we should be concerned with is whether a greater efficiency in our judicial system will result from a change being made and if so what change should be made for the reaching of that end. These problems have been selected because either they are matters which have been the subject of obvious criticism by students of judicial administration or are phases of the judicial system which many states have concerned themselves with and seen fit to change.

Rule-making Power for the Regulation of Practice and Procedure

Presently the regulation of practice and procedure is considered a function of the Mississippi Legislature and that body has not seen fit to delegate this power to the Supreme Court. For many years the Mississippi State Bar has made unsuccessful attempts to institute a change in this matter. In 1947 the State Bar passed by a majority vote a resolution to introduce a bill by the Legislature which would give to the Supreme Court of Mississippi powers very similar to those given in 1934 to the Supreme Court of the United States. This bill, which was defeated, would have vested in the Supreme Court the power to prescribe from time to time *general rules of pleading, practice, writs, process* and *procedure* in *civil cases at law and in equity in the chancery, circuit,* and *county courts* of the state; and provided for *the submission of the rules so prescribed to the legislature for rejection, modification* or *addition* thereto. Since then the State Bar at its annual meetings in 1949 and in 1950 again proposed to continue the fight for passage of the legislation. Those advocating the change support their position with the following reasoning: (1) the power to make rules of procedure was originally and inherently in the common law courts, which traditionally were regarded as the proper source for the making of rules to govern their own proceedings; (2) the Supreme Court being the court of last resort with the responsibility of finally deciding the substantive rights of the parties is

*Professor of Law, University of Mississippi.

the proper authority to determine the rules under which the substantive rights are to be decided; (3) the legislature is essentially a body of laymen and not competent to determine technical rules of civil procedure.[1]

The principal objection voiced to such proposal has been a fear on the part of some that this would be a delegation of legislative power to the courts. This allegation of a violation of the principle of separation of powers is unsound both practically and theoretically. As a matter of fact the proposed bill would leave the *final control* in the legislature, giving to the highest judicial body of the state the responsibility of procuring a workable set of procedural rules for all courts of the state. About one-half of the states have adopted a system granting a rather complete rule-making power to the courts. It has been reported that this has met with a high degree of success.[2] Flexibility and simplification of the rules has resulted. "The vesting of such authority in a unified state judicial organization in no way limits the authority of the legislature. It frees the legislative body from the task that it can never competently perform, and vests that task in the body that has the greatest interest in its efficient performance."[3]

Perhaps the most efficient and simplified set of procedural rules in use today are the product of the judiciary. In 1934 Congress conferred upon the Supreme Court the power to prescribe by general rules for the district courts and the courts of the District of Columbia, the form of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.[4] The court was also given the power to merge law and equity so as to secure one form of civil action and procedure for both. On January 3, 1935, the Rules of Civil Procedure for the District Courts of the United States were promulgated and became effective on September 16, 1938. These rules have been amended from time to time and are now called the "Rules of Civil Procedure for the United States District Courts."[5]

It is submitted that plenary power should be given to the Supreme Court of Mississippi in the matter of regulating practice and procedure in all courts of the state. A complete power is necessary and anything short of this will be ineffective.[6] The total responsibility should be in the Supreme Court without the power of modification, rejection or addi-

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[1]Proceedings of the Forty-Second Annual Meeting of the Mississippi State Bar, (1947), 18 Miss. Law J. 491 at 513-23.

[2]Vanderbilt, Minimum Standards of Judicial Administration (1949), p. 140.

[3]Dodd, W.F., State Government (2nd ed.), p. 339.

[4]Title 28, USC § 2072.

[5]Id. at 2071-73.

[6]Nebraska had the unfortunate experience of giving the power to the court with the legislature reserving the right to reject or modify. The legislature rejected the rules submitted and then repealed the statute authorizing the power to the court. See Neb. Sess. Laws (1939) c. 30 and c. 63.

tion in the legislature. Should the court fail to shoulder its responsibility, the legislature can withdraw the power.

Court Administration

In so far as matters of administration were concerned, the federal courts were for many years virtually independent of each other with little to link them together.[7] There was practically no integration of the many parts of the federal judicial system. Gradually steps were taken to cure this situation with the result that today we have a federal administrative system which has no equal in the majority of the state courts.[8]

It was not until 1922 that any real strides were taken towards setting up a responsible system for the administration of federal courts. In that year Congress passed an act which introduced two important instruments of administration.[9] The Chief Justice of the United States was given authority to assign district judges anywhere in the United States provided the need was certified by the senior circuit judge of the district requesting aid, and provided the senior judge of the circuit supplying the services certified they could be dispensed with temporarily. Secondly, the act created the Judicial Conference of Senior Circuit Judges. This Conference was to meet annually to discuss the state of the federal judicial business, to make recommendations to Congress for the creation of additional judgeships, and to submit suggestions to the various courts as might seem in the interest of uniformity and expedition of business. Today, as found in United States Code, Title 28, Secs. 291-296, broad powers are given to both the Chief Justice of the United States and the chief judges of the circuits for the temporary shifting of judges anywhere in the United States. This has been helpful in decreasing the congestion of business and has made possible in a limited degree a greater equalization of work. The Judicial Conference of Senior Judges is presently known as the *Judicial Conference of the United States.*[10]

In furtherance of the development of this unified system of administration, Congress in 1939 passed the Administrative Office Act.[11] This act created the instruments necessary to round out a centrally supervised system. An Administrative Office of the United States Courts with a director at its head was created. The director is appointed by the Supreme Court and thus there is no threat to judicial independence.

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[7]In 1850 (9 Stat. 442) it was provided that when the district judge of a district was unable to function on account of sickness or disability, the judge of another district within the circuit might be assigned to act in his place. This remedy was broadened in 1907 (34 Stat. 417) to permit a judge to be assigned from another circuit by the Chief Justice of the United States if no judge was available in the circuit.

[8]New Jersey has made the greatest strides forward of any state. See Vanderbilt op. cit. note 2 at Chap. 11.

[9]42 Stat. 839 (1922).

[10]Title 28 USC No. 331, 42 Stat. 837 (1922).

[11]53 Stat. 1223 (1939), 28 USC 601-10 (1948).

This office which is supervised and directed by the Judicial Conference carries on the "housekeeping" of the courts. It is entrusted with administrative matters relating to the offices of clerks of the courts, the collecting of information on the state of the dockets of the courts, the collecting of statistical data and reports as to the business of the courts, the providing of accommodations for courts and the business of the courts, the providing of accommodations for courts and employees, the disbursing of funds appropriated to the courts, the purchasing of equipment, the auditing of vouchers and accounts of the courts and their clerical and administrative personnel, and the performing of such other duties as may be assigned by the Supreme Court or the Judicial Conference of the United States. Secondly, the act of 1939 created in each circuit a *Judicial Council,*[12] composed of the circuit justices. To this Council which meets twice each year is submitted the quarterly reports of the Director of the Administrative Office for action. The Council makes in its meetings such orders as are necessary for the efficient and expeditious administration of the business of the courts within the circuit. The district judges are charged with carrying out orders given by the Council. Thirdly, the act required that in each circuit there be an annual conference of all circuit and district judges with members of the bar of the circuit to consider the state of the business of the courts and to make recommendations for improvement of the administration of justice in the circuit. This is known as the *Judicial Conference of the Circuit.*[13]

The purpose in establishing an orderly system of administration of business is obvious. Unless the unnecessary burdens are lifted from the shoulders of the judges an efficient performance of their judicial functions will be deterred. Administrative problems today are most complex and should be handled by specialists in that field. Thus the federal system is a model which has been the subject of study in many states. It has meaning for the general problem which has confronted all states in the Union, and its force has been felt in producing a new drive and vigor on the part of judicial reform groups.[14]

As Judge Ethridge so aptly put it, financially the judicial system of Mississippi is "big business, and one would think that the state would have organized thoroughly under some centralized authority and competent business direction the non-judicial business of the courts."[15] However, the judicial system of Mississippi is as decentralized as that of any state in the Union with the many evils which accompany such situa-

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[12]28 USC 332 (1948).
[13]28 USC 333 (1948).
[14]See Chandler, H. P., *The Administration of the United States Courts,* speech before the Judicial Conference of the Eighth Circuit at St. Louis, Missouri, March 7, 1941, published in pamphlet form.
[15]Ethridge, W. P., Modernizing Mississippi's Constitution (1949), p. 99.

tion. Again as pointed out by Judge Ethridge it will take a constitutional change to cure the situation.[16] The judiciary has no control over its clerical force. The clerks of all courts are elected by popular vote. This method of selecting is provided for by the Constitution. The only reports to be made by the clerks of the courts are of a financial nature. There is no law requiring the compilation of statistical records regarding the business of the courts. It would seem obvious that without such records compiled in a central bureau it is impossible to determine the work loads of the various courts, the wastes which can be alleviated, and the studies which are relevant to the improving of the system as a whole. It is submitted that the clerical staff of each of the lower courts should be appointed by the judge of that court; that an administrator should be appointed by the Chief Justice of the Supreme Court, the person who should be responsible for the over-all administration of all state courts; that this administrator should appoint his staff and should carry on similar duties to those assigned the administrator of the United States Courts.

Selection, Tenure and Removal of Judges

At the end of the Revolution no state in the union elected its entire judiciary by popular vote. In the majority of states selection was by the legislature while in a few the governor appointed.[17] Usually there was tenure for life. With the realization of the tremendous power vested in the judiciary and influenced by the political philosophy of Jacksonian democracy, the state of Mississippi effectuated the first change to popular election in 1832. The trend to the election system however was not ushered in until 1846 when New York succumbed to the movement. Thereafter many states *shifted* to election of their judges and all the newly admitted states adopted this method.[18] With this change came the transition to limited tenure. In 1861, twenty-two of the thirty-four states elected their judges. No state voluntarily reverted to the appointive system until the reaction was begun by California in 1934.[19]

From 1865 until 1915 there was a growing interest in a change for a better judiciary but no serious attempts were undertaken to alter the basic system. "Among the remedies proposed were separate judicial nominating conventions, nonpartisan ballots, direct primaries, elections of judges on different days from the election of other officers, and bar association referenda to instruct the lay voters."[20] Since the end of the

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[16]Id. at pp. 99-104.

[17]McCormick, Chas. T., *Judicial Selection: Current Plans and Trends,* 30 Ill. Law R. 446 at 447; Peltason, J. W., *Missouri Plan for Selection of Judges,* Ch. II, p. 33 (1945).

[18]Hurst, *The Growth of American Law* (1950), p. 123.

[19]Haynes, E., *Selection and Tenure of Judges* (1944), Chap. IV especially.

[20]Peltason, J. W., *Missouri Plan for Selection of Judges,* p. 33.

first world war there has been an active movement towards a change in the basic system.

In 1915 an unsuccessful attempt was made to introduce the appointive system in California. In 1921 the American Judicature Society and Albert Kales advocated a plan which was an innovation. Under this plan people would elect a Chief Justice for a short term who would select men to fill the vacancies on the Supreme Court. These associate justices would sit for an indeterminate term, going before the people for confirmation from time to time. This plan would give the power of selection to one qualified and at the same time give to the people a check on tenure. Plans similar to this were proposed with some variations. In 1934 California adopted an amendment that provided for appointment of judges by the Governor, with confirmation by a majority of a Commission on Qualification, composed of the Chief Justice of the Supreme Court, the presiding Justice of the District Court of Appeals of the district in which the appointed judge is to serve, and the Attorney General. After a year the appointed judge runs on his record in an election. If he is approved he serves out the remainder of his term. This plans has been adopted for the appellate judges only, although the counties may adopt it.[21]

In 1937 the American Bar Association adopted the following plan as being acceptable as a substitute for the elective system which they felt should be changed:[22]

> (1) Filling of vacancies by appointment by the governor or other elected official (s) from a list named by another agency. This other agency to be composed of high judicial officers and laymen, selected for this one purpose, holding no other public office.
>
> (2) If further check on these appointments is desired, confirmation by the State Senate or other legislative body.
>
> (3) After a period of service, the judge is eligible for either reappointment, or to go before the people, who should vote upon the question, "shall Judge Blank be retained in office?"

This general plan was the basis for the present Missouri Court Plan, adopted in Missouri in 1940,[23] often referred to as the "Non-partisan Court Plan." Under this plan the governor is the appointing agent, though his appointments are limited to one of a list of three candidates presented to him by a nominating commission. That commission is composed of a judicial officer serving ex officio, lawyers elected by lawyers, and laymen chosen by the governor. There is a commission for nominat-

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21Constitution of California, Art. VI, Sec. 26 (1934).
22Am. Bar Assoc. Journ. Vol. 23, No 2 (Feb. 1937) p. 105.
23Constitution of Missouri, Amend. No. 3 to Art. 6.

ing candidates to the Supreme and Appellate Courts, and separate commissions for each of the circuits to which the plan is applicable. After a year's service the judge runs on his record at the next general election. No judge is allowed to contribute to or take part in any political campaign.

Presently several methods are in use in the different states for selection of judges in the various courts.[24] Popular election of the judges of the highest courts is prevalent in 36 states, and of these, 22 use the partisan ballot. The judges of the highest courts are appointed in 12 states, some giving the power of appointment to the governor with advice and consent of a council, and others to the governor with the advice and consent of the senate. In four states the legislature appoints the judges of the highest court by a majority vote of both houses sitting jointly. In one state the legislature appoints the judges of the highest court upon nominations of the governor. California and Missouri use the method detailed above.

There is a growing feeling of need to improve the judicial personnel in the courts of many of the states. This has been manifested by the more than casual interest shown for the problem by the bar. California and Missouri have led the way in reform and though their plans are not perfect, "they are an improvement over both the elective and the appointive systems, combining the best points of each and avoiding the evils of both.[25]" "The Missouri Plan insures careful selection in the first instance but leaves to the people the final determination." Because of the Plan, "there will be judicial independence and, at the same time, a means of removing the unqualified. There will be a salutary check upon the appointive power. . . . Political activity will not be the price of tenure. Men of character, learning and fine sensibilities will not be deterred from accepting office. And because of the Plan judges will be relieved of political burden; they will know that their re-election depends upon their records and those only. They know the decision will be by the people of the state and not by a political boss or a party convention."[26]

All states but one have some method provided for the removal of judges from office when found unfit. Twenty-one states have only the impeachment method, while the remainder have alternative methods such as recall, executive action, combination of executive and legislative action and judicial action.[27] The majority of states have some provision for retirement based upon age or a combination of this and service.[28]

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[24]Peltason, *supra* note 20 at p. 40 and 41 and Haynes supra note 19 at Chap. IV.
[25]Peltason, *supra* note 20 at p. 69.
[26]Peltason, *supra* note 20 at p. 69.
[27]For detailed breakdown by states see Vanderbilt supra note 2 at pp. 21-23.
[28]Id. at pp. 23-25. 17 Miss. Law J. 99, Retirement of Judges.

As stated above, Mississippi was the first state to adopt the popular election of judges. Under the first Constitution which was adopted in 1817, judges and the chancellor were appointed by the legislature with tenure during good behavior.[29] That instrument also stated that no judge should be appointed to or remain in office after reaching the age of sixty-five. Under the second Constitution adopted in 1832 which provided that all judges should be elected by the people,[30] the tenure was limited and varied in the different courts. Although Mississippi was the first state to adopt the elective method it also was one of the few states which subsequently returned to the appointive system. Under the Reconstruction Constitution of 1869 it was provided that the Supreme Court judges and the chancellors were to be appointed by the governor with the consent of the senate.[31] Only the justice of the peace continued elective. The tenure of office remained limited with a maximum of nine years which applied to the Supreme Court. This method was not altered until the present Constitution was amended in 1910[32] for circuit and chancery courts and in 1914[33] for the Supreme Court. These amendments changed the method to the present elective system in effect in the state of Mississippi.

Separate Courts of Law and Equity

The Constitution states in regard to the jurisdiction of Circuit Courts that:

> The circuit court shall have jurisdiction in all matters civil and criminal in this state not vested by this constitution in some other court, and such appellate jurisdiction as shall be prescribed by law.[34]

The circuit court is a court of general jurisdiction, i.e. a respository of all jurisdiction not given to other courts. It has original jurisdiction in all common law actions where the principal of the amount in controversy exceeds two hundred dollars. It also has jurisdiction over all prosecutions in the name of the state for treason, felonies, crimes and misdemeanors, although as will be seen below there is concurrent jurisdiction for some crimes in other courts, and in counties having county courts the Circuit Court can transfer its jurisdiction to the county courts for the trial of any but capital offenses.[35] The Circuit Court has been given appellate jurisdiction in some instances, notably, appeals from the justice of the peace court and from the county court.[36]

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[29]Const. of Miss (1817), Art. 4, Sec. 17; Art. 5, Sec. 9.
[30]Const. of Miss. (1832), Art. 4, Secs. 2, 11, and 16.
[31]Const. of Miss. (1868), Art. 6, Secs. 2, 3, 11, and 17.
[32]Const. of Miss. (1890), Amendt. 1910, Sec. 153.
[33]Const. of Miss. (1890), Amendt. 1914, Secs. 145, 149. See Laws 1914, c. 156, p. 214. The official code of 1930 mistakenly prints sec. 145 as it read in 1890.
[34]Const. of Miss. (1890), Art. 6, Sec. 156.
[35]Miss. Code (1942) Sec. 1605.
[36]Miss. Code (1942) Sec. 1617.

The jurisdiction of the chancery court is spelled out in the Constitution as follows:[37]

> The chancery court shall have *full* jurisdiction in the following matters and cases, viz:
>
> (a) All matters in equity;[38]
>
> (b) Divorce and alimony;
>
> (c) Matters testamentary and of administration;
>
> (d) Minors' business;
>
> (e) Cases of idiocy, lunacy, and persons of unsound mind;
>
> (f) All cases of which the court has jurisdiction under the laws in force when this constitution is put into operation.
>
> And in addition to the jurisdiction heretofore exercised by the chancery court in suits to try title and to cancel deeds and other clouds on title to real estate, it shall have jurisdiction in such cases to decree possession, and to displace possession; to decree rents and compensation for improvements and taxes; and in all cases where said court heretofore exercised jurisdiction auxiliary to courts of common law, it may exercise such jurisdiction to grant relief sought, although the legal remedy may not have been exhausted on the legal title established by a suit at law.
>
> And the chancery court shall have jurisdiction, concurrent with the circuit court, of suits on bonds of fiduciaries and public officers for failure to account for money or property received or wasted or lost by neglect or failure to collect, and of suits involving inquiry into matters of mutual accounts; but if the plaintiff brings his suit in the circuit court, that court may on application of the defendant, transfer the cause to chancery court, if it appears that the accounts to be investigated are mutual and complicated.

As pointed out by Dr. Butts, the Supreme Court has given a rather broad construction to the scope of the term "equity," and has gone beyond the historical limitations of "matters in equity."[39]

In England and in the majority of our states there has been a merger of the courts of law and equity. The separate rules still exist but they are administered by the same judges in the same cause. Law and equity have been merged in the Federal Courts by the Federal Rules of Civil

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[37]Const. of Miss. (1890), Art. 6, Secs. 158, 160 and 161.

[38]See State v. Speakes, et al. 144 Miss. 125, 109 So. 129 (1926); and W. H. Williams Co. v. Federal Credit Co. et al. 21 So. 2d 582 (1945).

[39]Butts, A. B., The Court System of Mississippi, 3 Miss. Law J. 97 at p. 120.

Procedure adopted in 1938.[40] There is no justification for maintaining separate courts and the reasons for the distinction are purely historical. Although the framers of the Constitution of Mississippi realized that there were inherent weaknesses in the historical dichotomy of law and equity they did not see fit to merge the courts into one. Some objections to the dual system have been remedied. One provision of the Constitution provides that there shall not be a reversal of a case by the Supreme Court merely because it was brought in the wrong court.[41] Another provision states that where the case is brought in the wrong court it is the duty of that court to *transfer* the cause to the proper court.[42] Speaking of the first of the above provisions, an eminent jurist of Mississippi is of the opinion that is is a cure-all of the defects in the dual system.[43] In fact it is not.

Nothing in the Constitution will prevent the Chancery Court of Mississippi from enjoining actions at law.[44] Furthermore, if a case brought in the wrong court is transferred to the proper court, there is unnecessary delay and expense. The clerk of the court makes the transfer of all the papers to the proper court, the defendant has thirty days to answer after the new complaint or declaration is filed, and costs must be paid in the court from which the case was transferred.[45] The objection to a dual system, perhaps most often made, is the complexity which it introduces in the judicial system; two sets of rules, two classes of remedies, and two courts with the multiplied cost which accompanies such a dichotomy. It can thus be seen that although some of the unhealthy features have been cured by the Constitution, there still remain a substantial number which can only be abolished by a merger of equity and law courts. Both the parties and the taxpayers are justified in demanding a reform to modern practices. The merged court system is not in an experimental stage. It has proven itself where adopted.

The Justice of the Peace Court

It is incredible that the justice of the peace system has been able to survive in many parts of this country down to our modern times. It was brought to this country by the British colonists and in spite of its lack of a place in our present society has tenaciously continued to exist and operate.[46] There is a definite trend in the United States today to abolish this outmoded institution and this accomplishment will not be prema-

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[40]28 USC 2072, Rules 1 and 2.
[41]Const. of Miss. (1890), Art. 6, Sec. 147.
[42]Const. of Miss. (1890), Art. 6, Secs. 157 and 162.
[43]Griffith, *Chancery Practice,* p. 19.
[44]Ethridge, G. H., Mississippi Constitutions, See collection of cases pp. 291-2.
[45]Miss. Code (1942), Chap. 7, Secs. 1680-82 inc.
[46]*The Justice of the Peace System in the United States,* Smith, 15 Calif. L. Rev. 118 (1926).

ture.[47] Perhaps no other part of our judicial machinery could be abolished so justifiably.

It is true that it had a place in rural colonial days and it served its purpose well. Distances were far and communications were difficult making it necessary to decentralize the administration of justice. The justice of the peace was the keeper of the peace who settled minor disputes arising among neighbors in the sparsely settled colonies. His duties in fact were principally administrative in nature. The conditions which made his existence justifiable have long since passed. In a highly complex society specialization and professional training are an absolute necessity to an efficient judicial system.

Often it has been argued that the justice of the peace has little power in that his jurisdiction is limited to minor crimes and to civil matters involving small amounts. This is true, but we should not lose sight of the fact that to the laymen who must utilize these tribunals his case is as important as the more fortunate who have the benefit of trained judges.

It should be realized that the justice of the peace court is the tribunal with which the general public has the most contact.[48] Though the amount of the claim is small the volume of business is large. The public is entitled to a court at this level which is efficiently administered by trained and responsible officials, receiving salaries commensurate with their positions.

In Mississippi there are over four hundred duly elected justices of the peace who sit as tribunals for the meting out of justice. The qualifications for the office from a professional standpoint are nil. Both the office and its qualifications are constitutionally created.

Although the lack of any professional qualifications alone would make this institution a mockery of justice, the fact that compensation is by fees creates another obvious evil in the system. Fees are collected from the parties in the form of costs. In order to increase business, decisions may be rendered in favor of those who bring the business and not in favor of the one who has the law on his side. The temptation of practicing malfeasance is thus fostered by the economic insecurity in the office. Furthermore where there is more than one justice of the peace in the district and in cases where there is a concurrency of jurisdiction

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[47]Vanderbilt, *supra*, note 2 at pp. 306-16; *Pound, Organization of Courts* (1940), p. 251.

[48]Its jurisdiction extends to civil matters in which the principle amount sought to be received does not exceed two hundred dollars, and in criminal cases less than a felony. Const. of Miss. (1890), Art. 6, Sec. 171; Miss. Code 1942, Chap. 10, Secs. 1805, 1831.

with other courts the administration of justice may well become a competitive business.[49]

It would seem that the bar would make some concerted effort to abolish an institution which for many years has been justified in its existence solely for the purpose of being an excellent source of material for after-dinner stories, jokes and ridicule.

It is submitted that the relatively new county court system should be extended to take the office of the justice of the peace. The latter should be abolished completely, and the direct method for doing this would be by constitutional amendment. If it is felt that the political strength of the justice of the peace would at this time make such course impracticable, the same result could be reached by indirect method. Legislation creating county courts in every county in the state with judges who are qualified for such office would soon make the justice of the peace a tribunal having little if any business. This undoubtedly would result if all defendants could on motion remove the cause to the county court.

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[49]For interesting material on the subject see: Judicial Admin. in Miss. by Sikes, J. S., 6 Miss. Law J. 109-132; The Court System of Miss. by Butts, A. B., 3 Miss. Law J. 125; The Fee System in Misdemeanor Cases in the Justice of the Peace Courts in Miss., a comment, 19 Miss. Law J. 342-50; The Growth of American Law by Hurst, pp. 147-9; The Squire's Court by Welch, W. S., 8 Miss. Law J. 175-81.

REAL PROPERTY—SOME OBSERVATIONS

*Roscoe Cross**

CONTINGENT REMAINDERS

The average lawyer will recall that in the period of his preparation for the practice of law he went through the ordeal of his struggle with the confusing and apparently unrealistic maze of so-called learning in respect to the common law rules regarding contingent remainders. A contingent remainder was not an "estate" in land. It was merely a prospect or possibility which had to be protected or sheltered by a "prior particular estate of freehold" until such prospect or possibility had matured into recognition as an estate through the magic process of becoming "vested." The classic example was conveyance by A to B for life, remainder to X's children—with the added explanation that X had no children and might not even be married at the time of the conveyance. The embryonic lawyer was (and still is) correctly told that the provision for X's children constituted a contingent remainder subject to "destruction", *i.e.,* being wiped out, unless the provision for the children becomes vested before the termination of B's particular estate of freehold. At common law, B's estate ended by "forfeiture" if he undertook to transfer an estate or interest that was greater in quantity than the estate received by him from A. Or if B's estate and all of the ownership or interest in the land, *except the contingent remainder,* came into common ownership, then B's estate was cut off by "merger", *i.e.,* it was swallowed up by the larger interest or estate. And finally, B's estate might just run out in the normal course of effects, *i.e.,* by his death. If any of these three possibilities came to pass before the birth of any child of X, then the contingent remainder in favor of X's children was destroyed or wiped out. If, of course, a child or children were born to X before the expiration or termination of B's estate, then subsequent termination of B's interest had no effect on the interest right or estate of X's children regardless of when or how such termination came about. But these tag-ends of feudalism might not have been taken very seriously, because the young fellow who was ambitiously studying law learned to his relief that a number of jurisdictions including Mississippi had materially simplified the common law rules and their ties to seisin. Despite that comforting generality, let us take a look at the situation in Mississippi.

> Section 839 of the present Mississippi Code (1942) reads as follows: "*Alienation good for grantor's interest—remainder not affected.* All alienations and warranties of lands purporting to convey or pass a greater estate than the grantor may lawfully convey or pass, shall

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operate as alienation or warranties of so much of the right and estate in such lands as the grantor could lawfully convey, but shall not pass or bar the right to the residue of the estate purported to be conveyed; nor shall the alienation of any particular estate on which a remainder may depend, whether such alienation be by will or other writing, nor the union of such particular estate with the inheritance, by purchase or by descent, so operate, by merger or otherwise as to defeat, impair, or in any way affect such remainder."

The first clause of the above section, down to the semicolon, clearly deals with forfeiture under the common law rules and saves a contingent remainder from the consequences thereof. The balance of the section certainly prevents defeat or destruction of an intervening contingent remainder by the merger of a prior particular estate and the reversionary interest. But it is submitted that whenever the prior particular estate comes to an end by normal expiration before the contingent remainder has become a vested remainder, then the latter is not protected from destruction. In support of our contention, we invite attention to *Irvine v. Newlin,* 63 Miss. 192, decided in 1885.

In that case, the testator (who was illegitimate and had no issue) bequeathed by the third clause of his will a life estate in land to his widow, a part of the remainder "unto the heirs" of a half sister who was legitimate. The widow predeceased the half sister who was living at the time suit was commenced and had nine children. After the widow's death, two of the half sister's children purported to convey their interest in the land to the plantiff Newlin. The court below rendered judgment for the plaintiff for two twenty-sevenths of the land, which would have been their combined shares had they taken anything under the will. On appeal, the case was argued on whether or not the word "heirs" was to be applied in its strict legal sense or to be construed as meaning "children". The Supreme Court of Mississippi concluded that the word "heirs" was used in its strict legal sense and stated that, the half sister being alive at the termination of the life estate, she "had no heirs, no estate vested by virtue of said third clause, which failed for want of persons to take according to its terms."

At the time of that decision, Section 1199 of the Revised Code of Mississippi (1880) was in effect and a language almost identical to that of the present Section 839. The earlier section was not referred to, but there was no occasion to mention it because it did not apply or extend to a contingent remainder which had failed to become a vested remainder upon the normal expiration of a prior particular estate of freehold. The above quoted language of the Supreme Court was a clear cut pronouncement of the common law rule that upon normal expiration of a prior particular estate a contingent remainder falls, if it has not yet be-

come a vested remainder. Since that case does not appear to have been modified or overruled, so far as we have discovered, it would seem that the common law rule still obtains in Mississippi whenever the prior particular estate has expired in the normal course of events and before the contingent remainder has ripened into a vested remainder.

In the face of so many provisions in the present Mississippi Code abrogating the pitfalls of common law rules and simplifying the law of real property, the retention of the rule in *Irvine v. Newlin* would seem to be an unintentional trap for the unwary which might well be cured by legislation. There is no objection to the creation of contingent remainders or other contingent interests in Mississippi, so far as public policy may be concerned. On the contrary, they are well established and widely utilized. The process of effecting the change above suggested is a simple matter. One other state has covered the general field of contingent remainders by the following simple provision of statute:

> "A contingent remainder shall take effect, notwithstanding any determination of the particular estate, in the same manner in which it would have taken effect if it had been an executory devise or a springing or shifting use. . . ."

In connection with the broad field of contingent interests in land, we also call attention to the recent decision of the Supreme Court of Mississippi in *Hays et al v. Cole et al,* 73 So. 2d 258. There, a testator devised as follows by will admitted to probate in 1891:

> "I now will and bequeath to . . . Willie Cole the following real estate situated in . . . Panola County . . .
>
> "I will and bequeath all other property of every kind and description, which I may own at the time of my death and not specifically disposed of, to John A. Cole and Willie Cole in equal portions."
>
> "I direct that in case of the death of Willie Cole without issue that all property which he may have received from my estate go to John A. Cole in fee simple."

John A. Cole died in 1905 leaving issue surviving Willie Cole who died in 1951 without issue. The defendants claim title by mesne conveyances through a bank's foreclosure of a mortgage given by Willie Cole upon the real estate involved. The plaintiffs, issue of John A. Cole, brought suit to remove the cloud of defendants' claim.

While the end result of the decision in *Hays* v. *Cole* appears to be sound and proper, we note that the Court has said (on page 263 of the above cited report) that "John A. Cole acquired at the death of the testator *a vested interest in the contingent remainder, which was subject to be divested only by the subsequent death of Willie Cole at any time*

without issue surviving him." (Italics are ours). Although we have no difficulty in agreeing that John had an interest which was descendible and was contingent upon Willie's dying without issue, we submit that John's interest was clearly an executory devise and not a contingent remainder. Willie was bequeathed a fee simple interest and John's prospect of interest did not ripen into the fee by following or succeeding Willie's fee but by cutting across or destroying Willie's fee.

The prospect that a contingent remainder might have ripened into a vested estate in *Irvin* v. *Newlin* would not have affected the prior life estate in the slightest regard, and had it become a vested remainder its ultimate enjoyment in possession would have been realized after the expiration of the prior life estate. The historical development of contingent remainders and the statutory impetus given to executory interests by the Statute of Uses are strikingly different and the incidence of their creation do not have the same application, in the absence of legislative or other appropriate authority which obliterates the difference between the two types of contingent interests. We do not believe that *Hays v. Cole* can reasonably be construed as modifying the law as it exists in Mississippi under Section 839 (above cited) and *Irvine* v. *Newlin*. On the contrary, the language in *Hays* v. *Cole* may well lead to confusion and the existence of this last mentioned case seems to be a strengthening argument for appropriate action to wipe out the differences, in terms of practical results, between contingent remainders and executory interests.

Contingent interests constitute a body of useful and accepted tools for the disposition of property in the economic life of our present society. They may be treacherous, even in the hands of specialists and experts because of: (1) the threat of destructibility in the case of remainders; and (2) necessity of vesting in enjoyment under the rule against perpetuities in the case of executory interests. We believe it reasonable to conclude that it is practicable and desirable to strip contingent interests of their traps so that they may be used by those of us in small town general practice, as effectively as they may be applied in the case of the expert.

RECORDATION

As every lawyer knows, originally in England, there was no system for recording the transfer or conveyance of interests in or against land. As a matter of fact they would have nothing to record in the earlier days when the English landowner transferred an estate of freehold in compliance with the prerequisites of livery of seisin and in the presence of the required witnesses. A purchaser was taking his own risk and, at his peril, had to determine the actual state of the title in respect to any land in which he expected to acquire an estate. Such a state of things was probably not too much of a burden on the purchaser in the days when transfers were infrequent and were accompanied with a certain

amount of notoriety. The enactment of the Statute of Uses brought into being a new devise for the conveyance of legal estates in land, by way of a "bargain and sale". By that method, land could be transferred without any publicity or common knowledge of transfer. Foreseeing such possibility, Parliament promptly enacted the Statute of Enrolments which required the recording of the conveyance of a legal estate of freehold by resort to bargain and sale. This last mentioned statute appears to have been the first step toward a system of recordation, although that very statute became a dead-letter by virtue of the arrangement of "lease and release". The development of a system of recordation was begun in this country, as far back as the pre-revolutionary days, in the case of some colonies. Such a system has since been an established part of the land law of the respective states and in the District of Columbia.

It will, of course, be remembered that recordation is not designed nor required to protect the prior purchaser, grantee, mortgagee, lessee or other transferree who had already acquired his interest in land. The common law rule was the simple proposition that he who was first in time (in regard to acquisition) was first in right. If the later party had actual knowledge of another's prior acquisition or ownership of an interest adverse to his, such later party was put on notice and could act accordingly. But as the ceremony of feoffment, with its essential notoriety, was being replaced by the use of written instruments which were commonly delivered in privacy, it became increasingly difficult for the prospective transferree to determine the actual status of the land in which he might be interested. Consequently, the recording acts of our various states are intended to afford to the prospective transferree a fair and reliable means by and under which he may reasonably determine the state of the title or ownership in the land in which he may be disposed to acquire an interest. The customary method for accomplishing this is to provide by statute that a conveyance or transfer of an interest in land shall not be good against a bona fide purchaser for value *and without notice* unless, being in proper form, it is lodged for recording in the office of the appropriate official in the county where the land lies. Usually other separate provisions of statute put upon the official involved the duty to transcribe accurately, the instrument filed with him for record.

In terms of the operational application of the statutes, most jurisdictions have taken the practical position that from the time of the filing until actual recording the instrument itself stands in place of the record has been accomplished by the process of transcribing. In a majority of states, it appears to be the rule that the subsequent purchaser is bound only by the actual record so that damages sustained from any material or substantial error in the record falls on the prior recording party. (*Patton on Titles,* section 39). In the case of *Mangold* v. *Barlow,* 61

Miss. 593 (1884), the Mississippi Supreme Court adopted what it admitted to be the minority rule, namely, that all responsibility of the prior recorder is discharged when he lodges his instrument for record, so that the consequences of a material error are the burden and risk of the subsequent purchaser even though he be without knowledge as to the correct facts. We shall comment further with respect to this minority rule when we discuss, below, the matter of indexing.

Prior to 1924, the Mississippi statutes (Hemingway's Code) provided that an instrument of conveyance should not be good against the bona fide purchaser without notice unless, among other things it was "lodged with the clerk of the chancery court of the county in which the lands are situated, to be there recorded". Early that year the Supreme Court of Mississippi decided *Craig v. Osborn,* 134 Miss. 323, 98 So. 598. In that case, the defendant made a loan and took a real estate mortgage to secure it. Later the plaintiff, in good faith and without knowledge, made a loan to the same mortgagor and also took from him a mortgage on the same land. Defendant recorded his mortgage four days before plaintiff's mortgage was recorded. In deciding that plaintiff had priority despite the fact that the defendant had recorded first *after* both mortgages had been delivered, the Court said:

> "And it seems plain to us that the thing that the legislature intended to accomplish was the protection of the person buying or securing a lien in good faith without notice. It would have been an easy matter to have drawn the statute simply to provide that priorities would be governed by the date of the recording or filing of the several instruments".

Soon after that decision, the Mississippi Legislature amended the pertinent provisions of the statutes to provide: "priority of the time of filing shall determine the priority of all conveyances of the same land as between the several holders of such conveyances" *Mississippi Code* (1942), Section 867. Comparable modification went into other related sections which are now 868 and 869 of the present Code. Although *Owen* v. *Potts*, 149 Miss. 205, 115 So. 336, was decided in 1928, it involved similar facts occuring before 1924 and was decided on the authority of *Craig* v. *Osborn.* In *Gulf Refining Co.* v. *Travis,* 29 So. 2d 100, the Supreme Court of Mississippi (by Griffith, J) may seem to suggest that the only effect of the 1924 amendments was to make it clear that priority started from time of filing rather than recording. However, in that instance, the court was concerned with the effects of actual knowledge of ownership (in the absence of prior recorded deeds), against a subsequent purchaser, as evidenced by its statement regarding legislative intent that "there was no thought or purpose to interfere in any way whatever with the established rule with reference to the effect of actual possession of the land." Consequently we submit that *Craig* v. *Osborn* is no

longer law in Mississippi in determining priority under facts such as existed in that case. So that if today, the first taker recorded after purchase by the second taker (who was without actual notice) but before the second taker recorded, then the first taker would have priority under the precise language of Sections 867, 868 and 869 of the Code. That result seems to be satisfactory, because there being no recorded instrument of the first taker at second taker's consummation of his transaction the latter is in a position (or certainly should be) to effect filing of his instrument simultaneously with the completion of his transaction.

We now turn our attention to the relation of indexing to the matter of constructive notice for the subsequent purchaser. It is obvious that in the absence of an effective and accurate index it is impossible in these times for a prospective subsequent purchaser to make a reliable title search, because of the hopeless task of searching through each instrument of record. Nevertheless, there seems to be only the states of Iowa, North Carolina, Pennsylvania, Washington and Wisconsin whose statutes specify or are construed to make the indexing of instruments an integral and essential part of the recording. In most states, including Mississippi, the statutes covering the official's duties with respect to recording are separate from the sections setting the necessity for filing and recording as against the subsequent purchaser and the sections specifying such duties are usually construed as being directive, only. No Mississippi decision, in point, has been found, but from the rule in *Mangold* v. *Barlow* and by the language in Code sections 867, 868, 869, 877, 878, 879, 880 and 881, it is apparent that indexing is not a necessary part of the system, but is only directive to the official involved. We submit that the rule in *Mangold* v. *Barlow* and the present situation which puts all the risk and loss on the subsequent purchaser in the event of a material defect or omission in the recording or the indexing is a serious defect which is inequitable and ought to be corrected.

As already pointed out, the subsequent purchaser is virtually helpless when such errors arise from a system which is designed to give him a reasonably good chance to evaluate the validity of his prospective title. And instead of assisting him, the system simply becomes a trap by virtue of any material defects which would affect his title. That helpless individual has no means by which he may assure the accuracy of either the recording or the indexing. But the prior taker's situation is entirely different and there is no reason in the world why he should not be charged with the responsibility to determine that his instrument is properly recorded and properly indexed. The necessity for and the responsibility for accurate indexing of an interest in real estate or against real estate is not new or strange to Mississippi, as illustrated by the statutory provisions in respect to judgment liens. If one turns to Section 1555, and related sections, he will find the specification that "a

judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled." Another section (1554) then spells out that enrollment consists, in effect, of making an index through the use of "The Judgment Roll". Consequently, it seems clear that there is not constructive notice to the good faith purchaser without actual notice or knowledge unless "enrolled" or indexed. Most abstractors and title examiners are well aware that errors in recording and omissions in the index are by no means uncommon occurrences. If the prior purchaser has the responsibility for seeing that those two features are accurately complied with, then the recording system would effectively serve the purpose which it was intended to serve. Appropriate legislation in this regard would go a long way toward removing the uncertainties attendant upon dealings in real estate.

PERCOLATING WATERS

In regard to the matter of percolating water, we take this opportunity merely to point to the problem, rather than to try to explore its many ramifications. The matter of water supply and its utilization has long been a matter of vital concern to the arid and semi-arid sections of this country. But the steady increase of the country's population and the multitude of additional uses of water, are making us increasingly aware that water is not a commodity of unlimited supply and abundance. While irrigation has not yet become a common and general practice in the South, we are beginning to realize that each year a few more agriculturists have resorted to such use of water and on a wider or larger scale than in the previous year. The almost fantastic expansion of the demands for water are illustrated by the statement in 1952 that "in Washington, D. C., air conditioning plants are estimated to account for 15 to 20 percent of the water now used". (Nichols and Colton, "Water for the World's Growing Needs", The National Geographic Magazine, August 1952, page 269.)

The ever increasing consumption of water draws from bodies of water, flowing streams and so-called underground waters. So far as bodies of water or streams are concerned, a number of states appear to have (for better or worse) a considerable body of judge-made or statutory law in regard to the consumption or utilization of such waters. Rules in regard to percolating waters do not seem to have been so extensively developed. Lack of such development may be due in large measure to the fact that until comparatively recent years very little was known or ascertainable, scientifically, about percolating waters (*i.e.* waters which ooze or seep through subsurface of the earth without definite or established channels.)

The classic English rule rests upon the proposition that the owner of the soil owns to the sky and to the center of the earth. In *Mayor of Bradford* v. *Pickles,* 1895 A. C. 587, the House of Lords concluded that

the application of that rule gave the owner of the surface the right to appropriate percolating waters regardless of motive or reason. While that rule has been followed by some jurisdictions in this country, the doctrine of "reasonable use" has been adopted.

The application of the rule of "reasonable use" takes varying directions. In its initial, and probably orthodox application that rule simply recognizes the unlimited right of the surface owner to bring percolating waters from beneath his land to the surface so long as he uses the same *on his land.* As a refinement of this concept, such jurisdictions purport to apply the rule of "correlative rights" which may mean either a limitation of the taking on the basis of proportionate share or a right to take on the basis of and to the extent of the greatest utilization. In still other jurisdictions, the extent of the taking and use of such waters may rest upon the "priority of appropriation" which is another way of saying, 'first come, first served'—to the extent that the first man has been and is using before a second user turns up.

The Supreme Court of Mississippi appears to have considered the problems of rights to percolating waters for the first and only time in *Clarke County* v. *Mississippi Lumber Co.*, 80 Miss. 535, 31 So. 905, decided in 1902. In that instance, the plaintiff had an artesian well in the courthouse yard which afforded an adequate flow of water for a public drinking fountain. Subsequently, the defendant lumber company bored wells on its own land some 400 yards away and used compressed air to force to the surface of its land greater quantities than would have come to the surface. As a result, plaintiff's supply at its drinking fountain was diminished. The defendant needed and required a supply of water to float logs and to preserve them until they were manufactured in the course of its regular business. The water forced from the wells on its land was devoted to this regular business of the defendant. In affirming the Chancellor's dismissal of the bill in the court below, the Supreme Court quoted the classic statement of the English rule but went on to declare:

> ". . . it seems to be quite universally held that such waters belong to the realty, to be used at will by its owner for any purpose of his own, whether it be for machinery, mining, milling or a reservoir *on his own land.* . . . The right to bore for water to be used on the land for the business uses of the owner is fully recognized. This right is nowhere denied. In the case at bar, *there is no pretense of bad faith,* and none that the operations of appellee in any way affect the agriculture of the neighborhood, or that it is disturbed in any degree. . . . The mere boring of a single well might destroy the well of a neighbor on a lower level, but this would furnish no cause of action." (Italics ours).

It will be noted that the Court goes along with the English rule except in two particulars. It limits the use of the percolating waters to the owner of the overlying surface through which the water is brought. The Court also pointed to the fact that there was no suggestion of bad faith on the defendant's part. In respect to these two particulars, it would seem that Mississippi has followed the initial American rule of "reasonable use."

We have not referred to the *Clarke County* case for purposes of criticizing it, as there is a respectable amount of authority from other jurisdictions entirely consistent with the rule of this case. As indicated above there are various refinements to be considered or disposed of in the development of a body of law or rules relating to the increased importance of percolating waters and their use or appropriation. In the tempo of this era, it is apparent that the problems on this matter may arise much more quickly and in greater volume than we anticipate. With a court of last resort already overworked, it would be unfair to throw upon them the task of piecemeal development of a body of rules to cover the increasing and conflicting rights and claims regarding ground waters. A considered and comprehensive declaration of public policy by way of legislation would be a highly desirable method of approach. In 1952, Mississippi House Bill No. 329 was an opening approach to the matter by way of a proposal to regulate the waste or unnecessary waste of ground or percolating waters. The bill died in committee. However, we hope that another attempt at more extensive legislation may be made the subject of study and enactment before rights and uses of such waters become too conflicting or too well established to the detriment of the general welfare.

RECORDING CONDITIONAL SALE CONTRACTS IN MISSISSIPPI

*Hector Currie**

Mississippi is one of the few[1] states without a statute requiring conditional sale contracts[2] to be recorded.[3] At common law recording was unnecessary and the title retained by the seller was good against the world.[4] Naturally, the contract had to contain apt language to retain title in the seller.[5] Further, the transaction had to be in reality a sale and not a loan disguised as a sale[6] to avoid the appearance of taking excessive interest[7] or the necessity of complying with the chattel mortgage recording act.[8] Finally, granted that title was retained and that the transaction was genuinely a sale, it still was essential to the seller's superior right that the property sold be not intended for resale by the buyer,[9] though resale without the conditional seller's knowledge or assent would not affect his title to the goods.[10]

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[1]The Uniform Conditional Sales Act, which requires filing, is in force in ten states and in Alaska and Hawaii. Of the remaining states, all but half a dozen have recording acts, which are summarized in 3 *Williston on Sales,* Revised Edition. Appendix D, and in Jones, *The Law of Chattel Mortgages and Conditional Sales,* Sixth Edition, Sections 1008-1056.

[2]"Conditional sale contract" or "conditional sale" will be used to mean a contract or a sale where the property in the goods is to pass only upon payment of the price but where possession and the right to use the goods are transferred to the buyer. See Williston, *op. cit. supra* note 1, Section 324; 47 *American Jurisprudence* 7. They will not be employed to refer to a sale subject to a condition subsequent such as an option in the seller to repurchase the property on or before a certain day. These transactions are entirely distinct and they ought not to be, but they sometimes are, confused. See, *e.g.,* Ketchum & Cummings v. Brennan, 53 Miss. 596 (1876), a case of a title retention contract, wherein a case of a sale apparently subject to a condition subsequent was cited in support of the result.

[3]Miss. Code Section 863 (1942), provides that "Every writing respecting the title to personal property which by law ought to be recorded, shall be recorded in the office of the clerk of the chancery court of the county in which such property may remain;" Section 884 requires the chancery clerk to keep "Chattel Record-Books"; and Section 868 enacts that "all deeds of trust and mortgages whatsoever, shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they be acknowledged or proved and lodged with the clerk of the chancery court of the proper county, to be recorded i nthe same manner that other conveyances are required to be acknowledged or proved and recorded . . ."

[4]Jones, *op. cit. supra* note 2, Section 1004; 47 *Am. Jur.* 110.

[5]See 47 *Am. Jur.* 17: "Conditional sales are not favored in law, and where it is doubtful from the face of the instrument whether it is a conditional sale or a mortgage, the courts generally treat it as a mortgage. . . ."

[6]*Id.* at 19.

[7]See Hughbanks, Inc. v. Gourley, 12 Wash. (2d) 44, 120 P. (2d) 532, 138 ALR 658 (1941).

[8]Payne v. Parker, 95 Miss. 375, 48 So. 835 (1909). *Cf.* Burkhalter v. Mitchell & McLendon, 107 Miss. 92, 64 So. 967 (1914).

[9]Columbus Buggy Company v. Turley & Parker, 73 Miss. 529, 19 So. 232 (1895); Fairbanks Company v. Graves, 90 Miss. 453, 43 So. 675 (1907); *In re Agnew,* 178 Fed. 478 (S. D. Miss. 1909); Citizens Sav. & Inv. Co. v. Hunt's Garage, 128 Miss. 535, 91 So. 133 (1922); Garrett v. Hunter, 48 So. (2d) 437 (Miss. 1950). See also Vold, *The Divided Property Interests in Conditional Sales,* 78 U. of Pa. L. Rev. 713, 733: "Such cases fall within the range either of apparent or of actual authority, and the conditional seller is therefore bound on the ordinary rules of agency."

[10]Fairbanks Company v. Graves, 90 Miss. 453, 43 So. 675 (1907); United States Motor Truck Co. v. Southern Securities Company, 131 Miss. 664, 95 So. 639 (1923).

Within these limits, it is "the settled law of this state" that the seller's right under a conditional sale contract "is enforceable against an innocent purchaser for value without notice and that the doctrine of caveat emptor applies."[11] The rule was announced in 1876,[12] and it has been repeated in an unbroken series of cases[13] and invoked where the contract was made out of state whether recording in the other state was[14] or was not[15] required. Evidently, the doctrine creates a danger that credit may be given the conditional buyer or the goods bought from him on the strength of his possession and seeming ownership, and the danger is not averted by admonishing the transferee, after the fact, to beware. Our court recognized nearly forty years ago that "many wrongs [were] being perpetrated on innocent parties" and urged that the legislature should require conditional sale contracts to be recorded "in the same manner as deeds of trust are required to be recorded, and, in default of such recordation, they should be held void as to innocent third parties."[16] The court added: "Cases of this nature are frequently coming to this court, and the evil effect of this kind of contract is made more and more manifest." The volume of conditional sales is much greater now than it was in 1907, but the legislature has not acted, and the court has no choice but to follow its previous decisions.

Notwithstanding the absence of a general recording act for conditional sale contracts, there are three instances, defined by statute, where the seller must record[17] to protect his rights. These statutes are Sections 266, 273, and 870, Miss. Code (1942).

I.

Section 266. *Fraudulent loans of goods.*—And in like manner, where any loan of goods and chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained for the space of three years without demand made and pursued by due course of law on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made

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[11]Pike County et. al. v. Frazier, 212 Miss. 516, 520; 54 So. (2d) 745, 747 (1951).

[12]Ketchum & Cummings v. Brennan, 53 Miss. 596 (1876). In the earlier case of Mount v. Harris, 9 Miss. (1 S. & M.) 185 (1843), the sale was apparently subject to a condition subsequent; the court stated with doubtful accuracy that the seller "retained more than a lien; he did not part with the right" but the result was based on rescission of the contract.

[13]See, *e.g.*, in addition to cases already cited, Duke v. Shackleford, 56 Miss. 552 (1879); Journey v. Priestly, 70 Miss. 584, 12 So. 789 (1893); Harrison v. Broadway Motor Co., 128 Miss. 766, 91 So. 453 (1922); United States Fidelity and Guaranty Co. v. Northwest Engineering Co., 146 Miss. 476, 111 So. 846 (1927); Mitchell v. Williams, 155 Miss. 343, 124 So. 430 (1929); American Hoist & Derrick Co., et al. v. Lynn, 167 Miss. 93, 148 So. 351 (1933).

[14]United States Fidelity and Guaranty Co. v. Northwest Engineering Co., 146 Miss. 476, 111 So. 846 (1927).

[15]Mid-Continent Finance Corp. v. Grant, 213 Miss. 789, 58 So. (2d) 1 (1952).

[16]Fairbanks Company v. Graves, 90 Miss. 453, 460; 43 So. 675, 676 (1907)

[17]See Miss. Code Section 863 (1942).

of a use of property by way of condition, reversion, remainder, or otherwise in goods or chattels, the possession whereof shall have so remained in another for said time, the same shall be taken, as to the creditors and purchasers of the persons so remaining in possession, to be fraudulent within this statute, and that the absolute property is with the possession; unless such loan, reservation, or limitation of use or property were declared by will or by writing, proved or acknowledged, and filed for record.

The section applies to conditional sale contracts,[18] which consequently are held to be recordable as amounting to "a reservation or limitation of a use or property, by way of condition, reversion or remainder in goods or chattels, the possession whereof is in another."[19] The title of the seller, as against innocent[20] purchasers from or creditors of the buyer, will be defeated where, without either recording[21] or making demand and commencing action,[22] he allows the buyer to remain in possession for three years. Nor is this result affected by the awkward language of Section 267.[23]

2.

Section 273. *Business sign, and what to contain.*—If a person shall transact business as a trader or otherwise, with the addition of the words "agent," "factor," "and company," or "& Co.," or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if a person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property.

The business sign statute[24] was designed to preclude "the assertion of secret claims of ownership against creditors of him who has been permitted to possess property in his business as a trader[25] and appear to be its owner."[26] It does not affect the rights of the conditional seller against

[18]Lewis & Nichols v. Gilmer, 11 Miss. (3 S. & M.) 560 (1844). See also Jones, *op. cit. supra* note 1, Section 1030.

[19]Tufts v. Stone, 70 Miss. 54, 58; 11 So. 792, 793 (1892).

[20]Roach v. Anderson, 28 Miss. 234 (1854).

[21]Mask et al. v. Allen, 17 So. 82 (Miss. 1894); McKee v. Mitchell, 109 Miss. 320. 68 So. 468 (1915).

[22]Bry Block Mercantile Co. v. Paden, 144 Miss. 521, 110 So. 437 (1926).

[23]Jennings v. Wilson, 71 Miss. 42, 14 So. 259 (1893).

[24]For a discussion, see Schmitt, *The Sign Statute in Mississippi*, 1 Miss. L. J. 203.

[25]The meaning of the word has been considered in the following cases, among others: Yale et al. v. Taylor Manufacturing Co. et al., 63 Miss. 598 (1886); Willis v. Memphis Grocery Co., 19 So. 101 (Miss. 1896); Lyons et al. v. Steele & Co., 86 Miss. 261, 38 So. 371 (1905); Durham v. Slidell Company, 94 Miss. 140, 49 So. 739 (1904); Oliver v. Ferguson & Allen, 112 Miss. 521, 73 So. 569 (1916); Savers & Scovill Co. v. Doak, 127 Miss. 216, 89 So. 917 (1921); *In re Hemming*, 51 F. (2d) 850 (S. D. Miss. 1931); Ellzey v. Frederic, 191 Miss. 633, 3 So. (2d) 849 (1941).

[26]Paine v. Hall Safe and Lock Company, 64 Miss. 175, 1 So. 56 (1886).

the conditional buyer[27] or his transferee,[28] at least where the transferee is not also a creditor,[29] nor does it apply in a contest of the creditors of the conditional buyer among themselves.[30] Where the property was not "used or acquired" in the buyer's business[31] or was used in the buyer's business without the seller's assent, the statute does not apply.[32] In a case within the statute, however, the seller can protect himself only[33] by recordation.[34]

3.

Section 870. *Foreign mortgages on personal property recorded.*— Mortgages, deeds of trust, and other liens on personal property executed out of this state shall only be binding on such property in or when removed into this state, as against creditors and bona fide purchasers without notice, from the time such mortgage, deed of trust, or other instrument, duly acknowledged or proved, or a duly certified copy of the record thereof, shall be delivered to the proper clerk in this state for record.

Ordinarily, where the subject matter of a valid conditional sale in one state is brought into another state, the rights of the conditional seller in the second state depend upon whether the property was removed without his assent.[35] Thus, where the reserved title was good against third persons in the state of contracting and the property was removed

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[27]See *In re Whatley*, 30 F. (2d) 979 (S. D. Miss. 1929).

[28]Adams v. Berg, 67 Miss. 234, 7 So. 225 (1889); Gayden v. Tufts, 68 Miss. 691, 10 So. 53 (1891).

[29]Quin v. Mosler Safe Co., 21 So. 303 (Miss.1897).

[30]Dodds v. Pratt, Trustee, 64 Miss, 123, 8 So. 167 (1886); Kinney & Co. v. Paine et al., 68 Miss. 258, 8 So. 747 (1890); Campbell Paint & Varnish Co. v. Hall, 131 Miss. 671, 95 So. 641 (1923); Crump v. Hill, 105 F. (2d) 124, 124 ALR 165 (5th Cir. 1939); Dorsey et al. v. Latham, 194 Miss. 253, 11 So. (2d) 897 (1943).

[31]Orr v. Jackson Jitney Co. et al., 115 Miss. 140, 75 So. 945 (1917); Yellow Mfg. Acceptance Corp. v. American Oil Co., 191 Miss. 757, 2 So. (2d) 834 (1941).

[32]Adams v. Berg, 67 Miss. 234, 7 So. 225 (1889); Archibald v. General Motors Acceptance Corporation, 172 Miss. 278, 159 So. 843 (1935).

[33]Where the facts warrant, the seller may rescind for fraud. Frank, Herman & Co. v. Robinson et al., 65 Miss. 162, 3 So. 253 (1887). Whether, in the absence of fraud, repossession by the seller is effective against general creditors of the buyer is an open question in Mississippi. See Schmitt, *supra* note 24. An affirmative answer was made in a case arising under the Virginia sign statute, from which our statute was adopted, see National Cash Register Co. v. Thompson, 210 Miss. 37, 46, 48 So. (2d) 608, 609 (1950), by the United States Supreme Court, Finance and Guaranty Company v. Oppenhimer, Trustee, 276 U. S. 10 (1928), Holmes J. reading the Virginia statute as protecting lien creditors only. Despite the fact that only lien creditors are protected under Miss. Code Section 868, the general recording act, Loughbridge v. Bowland, 52 Miss. 546 (1876), it is far from sure that the same can be said of our sign statute, as witness Quin v. Mosler Safe Co., 21 So. 303 (Miss. 1897), where the protected creditor apparently had no lien. Clearly, without recordation and absent any problem or rescission for the buyer's fraud, the conditional seller has no right that can be asserted against a lien creditor or a trustee in bankruptcy (who enjoys the status of an ideal lien creditor under Section 70c of the Bankruptcy Act). *In re Waynesboro Motor Co.*, 60 F. (2d) 668 (S. D. Miss. 1932).

[34]John Van Range Co. v. Allen, 7 So. 499 (Miss. 1890); Tufts v. Stone, 70 Miss. 54. 11 So. 792 (1892); FitzGerald v. American Mfg. Co., 114 Miss. 580, 75 So. 440 (1917); National Cash Register Co. v. Thompson, 210 Miss. 37, 48 So. (2d) 608 (1950).

[35]Restatement, Conflict of Laws Section 275 (1934). The cases are collected in 13 ALR (2d) 1312 at 1333.

without the assent of the conditional seller, his title will be upheld in the state to which the property was taken even in the absence of recoring there—provided that the recording act in the second state is not applicable either expressly or by necessary implication to contracts made out of state.[36] Section 870, however, deals explicitly with "liens on personal property executed out of this state," and it was interpreted in *Patterson v. Universal Credit Corp.*[37] to require recording where by the law of the state of contracting a conditional sale creates only a lien. The contract in the Patterson case was made in Alabama,[38] but had it been made in Louisiana,[39] in Kentucky,[40] or perhaps in one of several other states,[41] the result would have been the same. The automobile, sold in Alabama, had been removed permanently[42] to Mississippi by the conditional buyer, with the seller's knowledge and assent. In the absence of such assent, Section 870 might not have applied.[43]

CONCLUSION

The conditional seller who fails to record his contract in Mississippi incurs several risks. (a) under Section 266 unless he is sure that payment will be completed or the goods reclaimed within three years; (b) under Section 273 unless he is sure that the buyer is not a "trader" who will "use or acquire" the goods in his "business"; and (c) under Section 870, where the contract was made out of state, unless he is sure that the law of the foreign state gives him "title" rather than merely a "lien". In addition, he may be confronted with difficult and unresolved legal questions, *e.g.*, whether "creditors" in Section 273 means lien creditors or any creditors, or whether Section 870 governs irrespective of assent. Conversely, one who buys chattels in Mississippi may later be defeated by a retained title of which he knew nothing and of the existence of which, as a practical matter, he could not have learned. A remedy would be provided by enactment of the Uniform Conditional Sales Act or by amendment of Section 868, Miss. Code (1942), as the court has suggested,[44] to include conditional sales.

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[36]C.I.T. Corp. v. Guy, 170 Va. 16, 195 S. E. 659 (1938). See also 25 ALR 1153, 1157; 13 ALR (2d) 1312, 1329.

[37]204 Miss. 268, 37 So. (2d) 306 (1948).

[38]The court relied on General Motors Acceptance Corp. v. Crumpton, 220 Ala. 297, 124 So. 870 (1929) and General Motors Acceptance Corp. v. Hamlin, 25 Ala. App. 522, 149 So. 864 (1933) as establishing that the seller in Alabama has only a lien.

[39]The conditional sale is not recognized in Louisiana; the buyer gets title and the seller a lien on the goods for the purchase price. Tangipahoa Bank & Trust Co. v. Kent et al., 70 F. (2d) 139 (5th Cir. 1934).

[40]Munz v. National Bond & Investiment Co., 243 Ky. 293, 47 S. W. (2d) 1055 (1932) and cases cited. *Cf.* Denkins Motor Co. v. Humphreys, 310 Ky. 344, 220 S. W. (2d) 847 (1949).

[41]See 47 *Am. Jur.* 71. The Tennessee law is discussed in Mid-Continent Finance Corp. v. Grant, 213 Miss. 789, 58 So. (2d) 1 (1952).

[42]Occasional crossings into the state on business errands do not constitute "removal." Russum v. Gans et al., 190 Miss. 584, 1 So. (2d) 235 (1941). This is also law in the few states with statutes like Section 870. See 13 ALR (2d) 1312 at 1346.

[43]The statute, while not referring to assent, does not compel a construction opposed to the usual rule. See Note 35 *supra*.

[44]See Note 16 *supra*.

Interpretation of Oil and Gas Leases

*Arthur B. Custy**

When the owner of a mineral estate executes an oil or gas lease to his property thereby creating a lessor-lessee relationship his primary purpose in so doing is to receive a consideration in the form of delay drilling rentals and royalties.[1] The form of the oil and gas lease most commonly executed in Mississippi is the "Producer's Form 88," also frequently referred to as the "unless lease." The execution and delivery of such a lease in Mississippi by the owner of the minerals constitutes a conveyance to the lessee which operates to transfer a determinable fee simple estate.[2] Under the common law before a determinable fee simple estate could be created two requirements were necessary, the first, the creation of a fee estate of inheritance capable of lasting forever,[3] and the second, a provision in the instrument of conveyance that the estate granted shall be terminated automatically on the happening of a stated event usually referred to as a "special limitation."[4] The estate conveyed is capable of lasting forever, because provision is made for the lease to continue so long as oil or gas is produced, and it is possible that the production of the mineral could continue forever.[5] The American Law Institute has defined a special limitation as "that part of the language of a conveyance which causes the created interest automatically to expire upon the occurrence of a stated event . . . "[6] The estate granted under the oil and gas lease, then, terminates automatically upon the occurrence of the special limitation. The holder of the possibility of reverter is entitled to immediate possession and need take no affirmative action to declare the estate terminated.[7] The *ipso facto* termination of the determinable fee simple estate distinguishes it from the fee simple estate on condition subsequent, which is another type defeasible fee. The "right of entry for condition broken" which is retained by the grantor of an estate upon condition subsequent, requires an affirmative action on the part of the owner of this interest to terminate the estate and, if the right of re-entry is not exercised the estate will continue.[8] Constructional problems arise in oil and gas leases to determine whether the different clauses create conditions or special limitations or covenants.[9]

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[1]2 Summers, Oil and Gas (Perm. ed.) Sec. 391.

[2]Koenig v. Calcote, 199 Miss. 435, 25 So. 2d 763 (1946); Hall, The Application of the Determinable Fee Theory in Construing the Mississippi Mineral Lease, 19 Miss. L. J. 291 (1948).

[3]1 Tiffany, The Law of Real Property Sec. 220 p. 386.

[4]A. L. I. Restatement of Property Sec. 44 (1936).

[5]See Hall, note 2 supra at page 295.

[6]A. L. I. Restatement of Property Sec. 23 (1936).

[7]Id at Sec. 44, comment A, Illustration 1.

[8]A. L. I. Restatement of Property Secs. 24, 45 (1936).

[9]See Hall, *supra*. note 2, p. 295.

Oil and gas leases, in addition to containing those clauses classified as special limitations and conditions also contain covenants. The covenants contained in oil and gas leases impose duties upon the lessee to perform certain acts. Where, however, the lessee does not perform the requisite duty under the obligation of the covenant the lease does not determine automatically, but the breach of the covenant operates to give the lessor the right to terminate the estate or sue for damages.[10] Covenants in oil and gas leases take two forms: express and implied; the implied covenant being a fiction created to bring about a desirable result[11] is imposed by operation of law.[12] The use of the implied covenant is grounded in necessity and fair dealing as between the parties.[13] The parties may never have contemplated the situation developing which would later bring into operation an implied covenant.[14] Express covenants are simply an articulation of what the courts would read into leases in any event and are inserted in the lease by the parties to affect specific implied covenants.[15] Professor Walker concludes from a survey of the cases dealing with express covenants affecting the usual implied covenants in oil and gas leases that the great majority of express clauses have been inserted by lessees in order to restrict or reduce the nature of the obligation which may be imposed by implied covenants.[16] Professor Merrill indicates that if lessees continue to utilize express covenants in the printed form leases that the courts should be skeptical about the extent to which these clauses represent the agreement between the parties in the absence of clear proof that the clause was actually called to the lessor's attention. The analogy used is based on the cases reflecting the judicial skepticism concerning contracts which purport to limit a carrier's liability where the litigation concerns the fine print on tickets and baggage receipts.[17]

The various printed "unless" lease forms ordinarily contain common fundamental provisions; however they differ with respect to insertion of special provisions. The necessity for distinguishing between special limitations in a lease and implied covenants has been pointed out.[18] The express covenant which appears to be contained in most printed "unless" lease forms requires the lessee to drill offset wells on the leased premises to offset any well on adjacent land within a specified distance

[10]Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. 2d 27 (1929), See Pressler, Implied Covenants in Oil and Gas Leases, 18 Miss. L. J. 402 (1947).

[11]See Thomas, Non-Development of Oil and Gas Leases, 20 Miss. L. J. 304, at p. 313.

[12]Merrill, Covenants Implied in Oil and Gas Leases (2d ed. 1940) p. 27.

[13]3 1-A Texas Jurisprudence 225.

[14]See Merrill, *supra*, note 12 at p. 27.

[15]Walker, Express Clauses in Oil and Gas Leases Affecting the Usual Implied Obligations of the Lessee, 13 Miss. L. J. 292 (1941).

[16]Id at p. 305.

[17]See Merrill, supra, note 12 pp. 437 Sec. 202.

[18]Note 7 *supra*. See Pressler, Implied Covenants in Oil and Gas Leases, 18 Miss. L. J. 402, 404. "The distinction is fundamental and of vast importance to the rights of the parties to the lease."

of the leased land and draining it, if a prudent operator would do so. Other express covenants which appear from time to time and are not ordinarily contained in the so-called standard form lease require the lessee to drill a test or discovery well within a certain time, require the drilling of a specified number of wells on the land within a stipulated time limit, require the lessee to market the oil or gas after production is obtained, require the lessee to drill to a certain depth or at a particular location.[19]

Implied covenants have been categorized by Professor Merrill as: the implied covenant to drill an exploratory well, the implied covenant to drill additional wells, the implied covenant for diligent and proper operation of the wells and for marketing the product, if oil or gas is produced in paying quantities and the implied covenant to protect the leased premises against drainage by wells on adjoining land.[20] Professor Summers is of the opinion that there are five implied covenants, a covenant to drill wells within a reasonable time, testing the land for oil and gas, a covenant to drill test wells within a reasonable time after notice, even though the lease provides for delay by the payment of delay rentals, a covenant, if oil or gas be found in paying quantities, to proceed with reasonable diligence in drilling a sufficient number of wells to reasonably develop the premises, a covenant to protect the land from drainage through wells on adjoining land, by drilling offset wells and a covenant to market the product of producing wells.[21] Professor Walker limits his classification of implied covenants to four: the implied covenant to develop the premises with reasonable diligence, the implied covenant to protect the premises against drainage by using reasonable diligence in drilling offset wells, the implied covenant to use reasonable diligence in producing the oil and in marketing or utilizing the gas, and the implied covenant to use reasonable care in conducting all operations affecting the lessor's royalty interest.[22] It is apparent that, although there is no clear cut demarcation between the several implied covenants the leading authorities in the field are in more than substantial agreement with respect to classification. It is unusual for an oil and gas lease to contain an express covenant that the lessee shall be under no implied duties to the lessor unless the instrument contains other express clauses which impose affirmative duties upon the lessee with respect to the development and operation of the leased premises.[23]

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[19]2 Summers, Oil and Gas (Perm. ed.) Sec. 391 et seq. pp. 289-301.

[20]Merrill, Covenants Implied in Oil and Gas Leases (2d ed. 1940) Sec. 4, p. 23.

[21]2 Summers, Oil and Gas Sec. 395 (1938) p. 309.

[22]Walker, The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 11 Texas L. Rev. 399, 401.

[23]See Walker, Express Clauses in Oil and Gas Leases Affecting the Usual Implied Obligations of the Lessee, 13 Miss. L. J. 292, 295: Brooks v. Arkansas - Louisiana Pipe Line Co., 77 F (2d) 965 (CCA 8th, 1935), Lloyd's Estate v. Mullen Tractor & Equipment Co., 192 Miss. 62, 4 So. 2d 282 (1941) where the lease reads "no implied covenants regarding the measure of diligence to be exercised by the lessee in the drilling of

The absence of numerous express covenants in the standard lease form is not without reason. Leases are ordinarily acquired by the lessee a substantial period of time prior to discovery or development of the field. The conditions, characteristics and extent of the pool are not available to the lessee until there has been some development; coupled with the lack of this vital information is the fact of development itself. Unknown and unpredictable factors which enter into the developmental process in different oil and gas fields vary so extensively that the lessee, without the assistance of a clairvoyant, cannot express the obligations he is willing to assume with any degree of certainty,[24] other than to affect negatively by the use of an express covenant the finding of an implied covenant.[25]

In order for the courts to effectuate the primary objective of the lease, that is the development of the leased premises so that the lessor may have his consideration in the form of royalties, implied covenants have been raised in the lease.[26] In Mississippi, covenants in oil and gas leases will not be implied where there is an express covenant dealing with the subject; the Mississippi Supreme Court has therefore adopted the view which in substance excludes the possibility of the presence of any implied covenant which is different or contradictory in nature to one which has been expressed.[27]

Remedies for Breach of an Implied Covenant

There appears to be considerable diversity of opinion as to the appropriate remedy when the lessee has breached an implied covenant and the lessor sues. The several remedies available, and combinations thereof, seem to be directly related to the nature of the implied covenant breached.[28] An alternative decree may be entered where the lessee has breached the covenant of further development; this decree may order the lessee to drill one of a stipulated number of wells or forfeit the entire

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said land during the original five-year term hereof shall be read into this lease, it being the express agreement of the parties that the provisions of this paragraph set forth the exclusive conditions under which the lessee shall hold this lease for said original term of five years."

[24]Merrill, Covenants Implied in Oil and Gas Leases. (2d ed. 1940) Sec. 2, p. 19; Pressler, Implied Covenants in Oil and Gas Leases, 18 Miss. L. J. 405 (May 1947).

[25]See Walker note 23 *supra* at p. 292, 293.

[26]Walker, note 22 *supra* at page 401: "The sum total of these various implied covenants may be regarded as establishing the proposition that the lessee is under the implied duty to do everything that a reasonably prudent operator should do in operating, developing, and protecting the property so as to insure a reasonably rapid accrual of the largest royalties practicable, due consideration being given to the interests of both the lessor and lessee, so long, at least, as there is no express clause in the lease relieving the lessee of his implied duty in any particular situation."; 2 Summers Oil and Gas (Perm. ed) Sec. 395; Walker, Express Clauses in Oil and Gas Leases Affecting the Usual Implied Obligations of the Lessee, 13 Miss. L. J. 292 (1941); See note 24 *supra*.

[27]Lloyd's Estate v. Mullen Tractor & Equipment Co., 192 Miss 62, 4 So. 2d 282 (1941).

[28]Kulp, Oil and Gas Rights (1954) p. 678 et seq.

lease.[29] Cancellation has been ordered as to the entire lease in California,[30] and a part of the lease in Arkansas,[31] Kentucky,[32] and Oklahoma[33] for breach of the covenant of further development. Damages were awarded for breach of this covenant in Texas[34] and Illinois.[35] Mississippi has indicated that where there has been a breach of the implied covenant for development of the lease that forfeiture will be decreed where the lessor makes a demand upon the lessee and gives him a reasonable opportunity to develop. However, the right of the lessor to demand a forfeiture cannot be arbitrarily exercised.[36]

Where there has been a breach of the implied covenant to protect the leased premises from drainage the usual remedy is damages,[37] similarly, a breach of the implied covenant of diligent operation and marketing would make the lessee liable to respond in damages;[38] and in cases involving the breach of an implied covenant the burden is upon the lessor to prove the alleged breach of covenant by a preponderance of the evidence to obtain equitable relief and damages.[39] As has been pointed out, the court may order cancellation of the lease under certain circumstances, but ordinarily will do so only after the lessee has had a reasonable period of time in which to comply; damages may be alleged and proved for breach of covenant but this is not a serious matter when compared with the loss of a lease.[40]

Statutes

In several oil and gas states the legislative bodies have passed statutes which offset implied covenants.[41] The covenants affected depend, of course, upon the purpose of the individual statute and the decisions reached by the court interpreting the statute. The problem confronting

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[29]Webb v. Craft, 120 Kan. 654, 244 Pac. 1033 (1926); McKenna v. Nichols, 193 Okla. 526, 145 P. (2d) 957 (1944).

[30]Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 74 Pac. 296 (1903).

[31]Smith v. Moody, 192 Ark. 704, 94 S. W. 2d 357 (1936).

[32]Hodges v. Mud Branch Oil & Gas Co., 270 Ky. 206, 109 S. W. 2d 576 (1937).

[33]Morrison v. Johnson, 199 Okla. 264, 185 P. 2d 208 (1947).

[34]Waggoner's Estate v. Sigler Oil Company, 118 Tex. 509, 19 S. W. 2d 27 (1929); Texas Pacific Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S. W. 2d 1031 (1928).

[35]Daughetee v. Ohio Oil Co., 151 Ill. App. 102, affirmed in 263 Ill. 518, 105 N. E. 308 (1914).

[36]Supra note 27 at page 287.

[37]Stanolind Oil & Gas Co. v. Barnhill, 107 S. W. 2d 746 (Tex. 1937); Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So. 2d 344 (1950).

[38]See Kulp, supra, note 28, Sec. 1071 p. 672 et seq.

[39]Phillips Petroleum Co. v. Millette, ... Miss. ....., 72 So. 2d 176 (1954) wherein the court dealing with the problem of proof said at page 183: "The proof is ample to support a decree for the amount awarded by the chancellor." Reed v. Barlow, ... Tex. ....., 157 S. W. (2d) 933 (1942). Magnolia Petrolcum Co. v. Connellee, ... Tex. ....., 20 S. W. (2d) 758 (1929).

[40]Eitel v. Alford, ... Colo. ....., 257 P. 2d 955 (1953). See 2 Oil and Gas Reporter 1062, distinction between covenants and terminal provisions of a lease; Humble Oil & Refining Co. v. Romero. U. S. Ct. App. 5th Cir. 1952. 1 Oil and Gas Reporter 358. Renner v. Huntington-Hawthorne Oil and Gas Co., ... Cal. ....., 244 P. 2d 895 (1952). 1 Oil and Gas Reporter 1063; Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. 2d 27 (1929). See 2 Oil and Gas Reporter 5, 6.

[41]Arizona, Indiana, Kentucky, Michigan, Nebraska; See Merrill note 12 *supra.*

the oil and gas attorney in those jurisdictions which have statutes which purport to deal with implied covenants is to determine whether or not the statute deals with the entire field of implied covenants or merely that which is specifically treated. The Mississippi statute[42] dealing with conservation of oil and gas no doubt is a valid authority to permit the court to interpret a covenant as being implied wherever the nature of the oil and gas lease indicates a contravention of the public policy of the State of Mississippi as expressed in the statute. Arizona[43] has conferred by statute an administrative remedy upon the lessor giving him the right to go to the administrative body and demand that the lessee show cause why a well should not be brought in within six months or the lease forfeited. Professor Merrill is of the opinion that the language of the Arizona statute, which was recently repealed, was broad enough to encompass all of the implied covenant duties.[44] Indiana has enacted a statute which makes void all recorded oil and gas leases if a year has elapsed since the last payment of rentals, both by the nonproduction of oil or gas and the nondevelopment of the leased premises.[45] The legislatures of Kentucky,[46] Michigan,[47] and Nebraska[48] have enacted statutes dealing with implied covenants. Although the statute in Nebraska was repealed in 1939,[49] ten years after its passage, leases taken during the time the statute was in force will be a source of potential litigation. The Michigan statute provides that covenants are not to be implied except in oil and gas leases.[50] The lessor in Arkansas is entitled to partcipate in money paid to the lessee as recompense for oil or gas produced from the leased premises,[51] and if royalties are paid instead of drilling offset wells, each forty acre unit on which the payments are made becomes an offset unit which requires the commencement of wells on adjoining lands within ninety days.[52] There is a requirement in Iowa that offset wells be drilled to wells producing in paying quantities, located within 330 feet of the lessor's boundary. These offsets must be commenced within ninety days after written notification of marketing of the mineral on penalty of forfeiture.[53] In Texas means for the measurement of gas and the ap-

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[42]Chapter 256, Laws of Mississippi, 1948, as amended. Superior Oil Co. v. Beery, 216 Miss. 664, 63 So. 2d 115 (1953) suggestion of error overruled in 216 Miss. 715, 64 So. 2d 357 wherein the court said at p. 119 of 63 So. 2d ". . . the obligation implied by law to protect against drainage is inapplicable where the lawful rules and regulations of the State Oil & Gas Board for the conservation of oil and gas are complied with."

[43]Arizona Revised Code (1928). Secs. 2493, 2495.

[44]See Merrill, note 12 *supra* at page 447.

[45]Ann. Ind. Stat. (Burns, 1952) Sec. 3-1633.

[46]Ky. Rev. Stat. (1948) Sec. 353.020; 353.030; 353.040.

[47]Mich. Comp. Laws (1929) Sec. 13, 281.

[48]Neb. Comp. Stat. (1929) Secs. 57-207; 57-208; 57-209.

[49]Neb. S. L. (1939). Ch. 70.

[50]See note 47 *supra*.

[51]Ark. Stat. (1947) Sec. 53-509 et seq.

[52]Ark. Stat. (1947) Sec. 53-508.

[53]Ia. Code Ann. (West, 1949) Sec. 84.2.

plication thereof to royalty payments excluding existing contracts are set forth in the code.[54]

The Implied Covenant in Mississippi

There have been several Mississippi decisions dealing with the problem of implied covenants in oil and gas leases since 1941. The first[55] arose out of a factual situation in which the lessor sought to cancel an oil and gas lease upon a tract of land, alleging that, among other things, the lessee had breached an implied covenant to develop the property for oil and gas within a reasonable period of time. The lease itself contained an express covenant that "no implied covenants regarding the measure of diligence to be exercised by the lessee in the drilling of said land during the original five year term hereof shall be read into this lease, it being the express agreement of the parties that the provisions of this paragraph set forth the exclusive conditions under which the lessee shall hold this lease for said original term of five years." The lease was also attacked on the grounds that it was a perpetual lease, contrary to public policy and violated the rule against perpetuities. The lessors and their successors in title had accepted the delay drilling rental as it was tendered annually from August 11, 1925, to August 11, 1939. When the suit was filed on December 7, 1939, to cancel the lease the lessor had received and accepted the annual rental for the year beginning August 11, 1939, and ending August 30, 1940. The court pointed out that such leases had been terminated in other jurisdictions, not because the provision of perpetual renewal violated the rule against perpetuities, but on the theory of an implied covenant to develop the land for oil and gas within a reasonable time. The Mississippi court recognized the basic philosophy of the oil and gas lessor-lessee relationship when it indicated that the main consideration was the development of the property and the payment of royalty; that the lessee should not be permitted to persist, as against the desires of the lessor, in refusing development of the lease for an unreasonable time and continue to extend the lease from year to year for an indefinite period of time by merely paying the delay drilling rental. In this state where the lessor desires the lessee develop the land, the lessee may not seek a forfeiture of the lease for nondevelopment on a theory of breach of an implied covenant to develop unless he first notify the lessee that he will not accept the delay drilling rental, that he is going to require the development of his land in good faith within a reasonable period of time. After such notification and lapse of time the implied covenant to develop will be breached and a forfeiture will be decreed. The court points out that an express stipulation on a matter precludes the possibility of an implication on the same

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[54]Tex. Rev. Civ. Stat. Ann. (Vern. 1949) Art. 6066b.

[55]Lloyd's Estate v. Mullen Tractor & Equipment Co., 192 Miss. 62, 4 So. 2d 282 (1941).

subject. The Mississippi court adopted the rule in this case that an express covenant upon a given subject, which is deliberately entered into without fraud or mutual mistake, will exclude the possibility of the existence of an implied covenant of a different or contradictory nature. The court cites a series of timber cases decided in Mississippi wherein it would not imply a covenant to remove timber within a reasonable time when the parties have expressly stipulated deferring the right to remove from year to year for a valuable consideration.

Millette v. Phillips Petroleum Company[56] was the next case involving a question of implied covenants in an oil and gas lease and arose in 1950. There the lessee owned leases of adjoining tracts of land and had drilled producing wells on the tract adjoining the lessors; these wells drained the lessor's oil. The lease contained an express covenant known as the "offset well" clause which read: "in the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, or acreage pooled therewith, *lessee* agrees to drill such offset wells as a prudent operator would drill under the same or similar circumstances." The wells which were drilled on the adjoining tract were not, however, within the distance limitations set forth in the "offset well" provision. The lessor notified the lessee of the drainage and demanded protection against the depletion of their oil reserves. The lessee denied responsibility and refused to surrender the lease. The lessor filed suit seeking cancellation of the lease and damages for the drainage; the trial court sustained a demurrer to the bill. On appeal the court pointed out that the existence of the express covenant to drill offset wells precluded resort to an implied covenant to require the lessee to drill offset wells unless the draining wells were within the one hundred fifty feet distance limitation expressly covenanted for. The court, however, then determined that there was an implied covenant breached in that a duty existed in the lessee to protect the interests of the lessor against a depletion of the lessor's lands by the affirmative act of the lessee on the adjoining property. This implied covenant, which could never be enforced against a stranger to the adjoining premises[57] is based upon public policy in that the laws of the State of Mississippi have declared it to be in the public interest to protect co-equal and correlative rights of owners in a common pool. The equitable duty which apparently not only exists by virtue of public policy, but also as an implied covenant operates to conserve the minerals of the lessor by requiring the lessee to refrain from affirmative acts of depletion. The interesting point raised

[56]209 Miss. 687, 48 So. 2d 344 (1950).

[57]Thomas, Non-Development of Oil and Gas Leases, 20 Miss. L. J. 304 (1949) at page 309: "There should be no distinction between a situation where the alleged drainage occurs from lands leased to other lessees. In other words the duty of protection should not be rendered more onerous by virtue of the fact that the lessee owns the draining well or wells . . ."

concerning the implied covenants is that the court separates the express covenant creating a duty to drill offset wells from this particular act by saying that the express covenant although absolving the lessee from drilling offset wells does not absolve him from liability for substantial drainage caused by his affirmative act. Presumably, when the parties contracted they were under the impression that the express covenant to drill offset wells would protect them in situations of this type. Then, under the decision in this case, there exists in Mississippi an implied covenant that the lessee will do nothing to impair the value of the lease; that the lessee must use reasonable care to protect the lessor from damage or loss from drainage by his own affirmative acts.

The Millette case appeared again before the Supreme Court in 1954.[68] There the court reaffirmed its former position, pointing out that although the trial court awarded damages after an express finding that there was not a sufficient quantity of oil underlying the lessor's land to justify the drilling of an offset well that the express duty to drill offset wells was separable from the implied covenant to compensate for drainage when the drainage has been caused by an affirmative act of the lessee.

There was a strong dissent[59] in the Millette case when it reappeared wherein it was pointed out that a departure from the prudent operator test might impede future oil and gas development in Mississippi. The dissent's position that there is now imposed upon the lessee a doctrine of absolute liability with respect to drainage is well taken particularly in the light of prevailing practice among producers to obtain a drilling block before commencing operations. The idea that a case of this nature will rarely arise is not supported by the fact of business practice among the producers. The point the dissent does not concede is the existence of an implied covenant to compensate for drainage where the depletory acts have been caused by an affirmative act of the lessee where the parties have expressly covenanted as to the matter of drainage. It is noteworthy that the majority does not depart from or abandon the prudent operator test in Mississippi; it simply was not applicable where the express covenant to drill off-sets was not breached, and therefore, is still the test in Mississippi in proper cases.

Clues to the psychological pattern of thinking reflecting the attitude of the majority with respect to the results reached is indicated in both Millette decisions. Justice Alexander remarked in the first Millette case[60] "But here the mind is haunted by the fact that the defendant is the beneficiary of the oil drained from plaintiff's land by the wells on the north

[58]Phillips Petroleum Co. v. Millette, ... Miss. ....., 72 So. 2d 176 (1954).

[59]*Supra,* note 58. Justice Ethridge wrote an excellent dissenting opinion which was concurred in by JJ. Holmes and Gillespie.

[60]Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So. 2d 344 (1950) at page 348.

and south which belong to the defendant." In the most recent decision[61] Justice Hall said: "It must be borne in mind that we are here dealing with a case where the oil company holds a lease on the Millette land and has failed and refused to develop the same by drilling but is draining the oil from its subsurface through a well or wells owned and operated by the company on adjoining land. . . . It is contrary to every concept of equity and justice to hold that a lessee may drill on adjoining land and through such a well drain dry the land on which it refuses to drill and thereby deplete the resources of its lessor and enrich itself to that extent without the expenditure of one dime in developing the adjoining land and then refuse to pay the lessor the royalty for his oil which it has taken from him." Apparently the court is reacting to what it considers a basic injustice explicit throughout both opinions. Presumably the parties to the lease had legal capacity to contract and entered into the lease with full knowledge of the consequences and without any fraudulent intent, the Mississippi Supreme Court has said that it does not make contracts for parties such as these and does not substitute its opinion of what would be advantageous to the parties.[62] Technically, it cannot be said that the court has made a contract for the parties. However, the age-old judicial device of calling the act by a different name is successfully utilized. By the simple device of implying a covenant the court successfully accomplishes that which it has previously proscribed.

The evidence in either case is not discussed except to say that the proof was ample to support the decree awarding damages to the lessor in an amount which appears to be one-eighth of the total oil drained, or the lessor's share of the royalty. Following the theory of implied covenant adopted by the court, there is nothing inconsistent in the trial court's finding that there was not a substantial quantity of oil underlying the lessor's land to justify the drilling of an offset well and then awarding damages for the drainage complained of. That quantity of drainage which does not amount to a sufficient quantity of drainage, measured by the prudent operator test, to justify the drilling of an offset well under the express covenant so to do is considered substantial drainage in order to justify an award under a breach of the implied covenant to compensate for drainage where the drainage has been caused by an affirmative act of the lessee.

Conclusion

The Mississippi decisions dealing with implied covenants in oil and gas leases establish the fact that there exists in oil and gas leases an implied covenant for development of the leased premises; that the remedy for failure to develop will be forfeiture after lessee has had notice and

[61]Phillips Petroleum Co. v. Millette, ... Miss. ....., 72 So. 2d 176 (1954) at page 178, 179.

[62]Chism v. Hollis, 152 Miss. 772, 118 So. 713 (1928).

a reasonable time in which to develop. There is also an implied covenant to compensate for drainage where the drainage has been caused by an affirmative act of the lessee; this implied covenant to compensate for drainage is entirely separable from the express covenant to drill offset wells under the prudent operator test. Damages are the appropriate remedy in such a suit.

Oil and gas attorneys in Mississippi have been operating under a tacit assumption that the Supreme Court of Mississippi will slavishly follow the oil and gas jurisprudence of the state of Texas.[63] In a recent case[64] counsel argued that "it is without dispute that Mississippi in formulating the rule of property as to the nature of the estate created by oil, gas and mineral leases in Mississippi, based such rule of property squarely on Texas decisions." The assumption then that the Mississippi Court will follow Texas oil and gas decisions is based upon some early Texas cases which, because of the fact that the theory of ownership of mineral estates in both Texas and Mississippi is the same, were ideal precedents for a court to adopt. This has not been true with respect to other oil and gas decisions renederd in Mississippi.[65] For example, in *Griffith v. Gulf Refining Co.*[66] the court said: "It is our conception that we are free to decide for ourselves all questions arising under the common law or under the statutory provisions of this state, that we are not bound by the decisions of courts of other jurisdictions on similar questions, that it is proper for us to consider them and that we may follow them only if we are satisfied of the soundness of the reasoning by which they are supported." The court apparently considered the matter in conference when deciding *Phillips Petroleum Co. v. Millette,*[67] where, speaking through Justice Hall the court said: ". . . and it has been suggested in our conference that we have heretofore adopted the policy of following the Texas courts in cases involving oil and gas law." The court again indicated it would follow the Texas case law on the subject only when it was satisfied with the soundness of the reasoning by which the decision was supported. The dissent in the same case urged the majority to follow the Texas decisions because the court had done so in the past.[68] It appears that the more conservative course is to urge Texas decisions upon the court as precedents, where applicable, and hope that the majority of the court will deem the precedent contended for as one sound in reasoning.

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[63]See Thomas, Non-Development of Oil and Gas Leases, 20 Miss. L. J. 304 (1949).
[64]Millette v. Phillips Petroleum Co., 209 Miss. 687, 693 (1950).
[65]*Supra,* Note 61; Griffith v. Gulf Refining Co., 215 Miss. 15, 61 So. 2d 306 (1952).
[66]*Supra,* Note 65 at page 307.
[67]*Supra,* Note 61 at page 182.
[68]*Supra,* Note 61 at page 186 where Justice Ethridge stated in the dissent: "In developing oil and gas law in Mississippi, we have rather consistently followed the Texas decisions."

THE "RIGHT TO WORK" STATUTE

*William P. Murphy**

On February 24, 1954, Mississippi enacted what has become widely known as a "right-to-work" statute,[1] thus becoming the fifteenth state to currently prohibit compulsory union security agreements. Later in the year South Carolina and Louisiana passed similar laws, bringing the total as of this writing to seventeen states.[2] The purpose of this article is to summarize for Mississippi lawyers the various types of union security arrangements, the arguments for and against union security, the statutory context out of which the various state laws have emerged, and finally, the litigation which has resulted under these state laws.

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[1]AN ACT providing that the rights of persons to work shall not be denied or abridged on account of membership or nonmembership in a labor union or labor organization and declaring the public policy of this state in this regard.

Section 1. *Denial or abridgment of work.* (a) It is hereby declared to be the public policy of Mississippi that the right of a person or persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.

(b) Any agreement or combination between any employer and any labor union or labor organization whereby any person not a member of such union or organization shall be denied the right to work for an employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be an illegal combination or conspiracy and against public policy.

(c) No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

(d) No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

(e) No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.

(f) Any person who may be denied employment or be deprived of continuation of his employment in violation of any paragraph of this section, shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this state such actual damages as he may have sustained by reasons of such denial or deprivation of employment.

(g) The provisions of this section shall not apply to any lawful contract in force at the time of the passage of this act, but they shall apply to all contracts thereafter entered into and to any renewal or extension of an existing contract thereafter occurring.

(h) The provisions of this section shall not apply to any employer or employee under the jurisdiction of the Federal Railway Labor Act.

Section 2. If any clause, sentence, paragraph, or part of this act, or the application thereof to any person or circumstances, shall, for any reason, be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, or the application thereof to any other person or circumstances, but such invalidity shall be confined in its operation to the portion of the act directly involved in the controversy in which judgment shall have been rendered or to the person or circumstances so involved, as the case may be.

Section 3. This act shall take effect and be in force from and after its passage.

Approved February 24, 1954.

[2]The following chart lists the states which have "right to work" provisions, the

A. *Types of union security arrangements.*

The term "union security" in labor relations refers to the various forms of agreement between employer and union which assure to the union either a stable membership, or a stable income, or both. As to membership, there are four principal types of union security arrangements.

(1) *The closed shop.* Here the employer agrees not to hire anyone who is not a member of the union; the employee, to retain his job, must continue to be a member in good standing. This is the most complete type of union security. It has had wide usage in the "craft" type unions, where membership is more or less exclusive, such as, for example, in the building trades, the printing industry, and the service trades. It is also effective in those fields where employment is "casual", i.e. intermittent and shifting. In the West Coast maritime industry, for example, the closed shop, operated through union "hiring halls", resulted in an efficient placement system.[3]

(2) *The union shop.* Under this arrangement, the employer can hire employees who are not union members; they must, however, become members of the union within a specified time, usually 30 days, and must maintain membership in good standing in order to retain their jobs. The union shop is less restrictive and results in less union control of employment than the closed shop, since the matter of original hiring is solely between the employer and the employee. The union shop is typically found in the "industrial" type unions, such as are found in the mass-production manufacturing industries of automobiles, rubber and glass. Since 1951, when it was first authorized for railroad employees, the union shop has had a rapid growth in this industry.

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year adopted, and whether by constitution, statute, or both.

State	Constitution	Statute
Alabama		1953
Arizona	1946	1948
Arkansas	1944	1947
Florida	1947	
Georgia		1947
Iowa		1947
Louisiana		1954
Mississippi		1954
Nebraska	1946	1947
Nevada		1952
North Carolina		1947
North Dakota		1948
South Carolina		1954
South Dakota	1946	1947
Tennessee		1947
Texas		1947
Virginia		1947

Delaware, Maine and Maryland formerly had such statutes. Recent unsuccessful efforts at enactment were made in California, Colorado, Idaho and Oregon.

[3]By way of contrast, the New York-New Jersey waterfront, where the "hiring hall" has not been used, has been the scene of recent revelations of murder and other violence, as well as scandalous graft and corruption.

(3) *Maintenance of membership.* Here the employee is not required to join the union either to get the job or to keep it; if he does decide to join, however, he must then maintain his membership during the remainder of the term of the contract. This arrangement frequently includes an "escape" period (15 days, usually) at the beginning of the contract term during which time a member may withdraw from the union without losing his job. Maintenance of membership arrangements came into wide-spread use during World War II as the formula through which the unions' desire for security was reconciled with employers' objections to the compulsory aspects of the closed shop and union shop. The desire of the steelworkers to go from a maintenance of membership to a union shop arrangement was one of the points of disagreement which led to the impasse preceding the seizure of the steel mills by President Truman in 1952.

(4) *Preferential hiring.* Under this type of agreement, the employer agrees to hire union members if they are available, the union undertaking to supply them. If the union cannot supply workers, the employer is then free to hire employees wherever he can find them and there is no requirement that employees join the union in order to retain their jobs. The preferential hiring system is the least used of all union security arrangements.

The union security device for achieving stability of income to the union is the *checkoff.* This is simply a payroll deduction plan under which the employer withholds the employee's union dues from his wages and pays them directly to the union. In the absence of statutory restriction, there are many possible variations in checkoff arrangements. The payroll deduction may be compulsory and automatic, or it may require the employee's consent. Such consent, if required, may be oral or written; it may be revocable or irrevocable. The deduction may be just for membership dues, or it may also include initiation fees, assessments, fines, or any combination of these charges.

B. *Reasons for and against union security.*

The issue of union security is one which is peculiar to the United States. In this country the individualistic, competitive philosophy of business enterprise found its fullest development. As a result, the opposition to unions by employers has been most vigorous, the history of that opposition being one which includes yellow-dog contracts, black lists, labor espionage and violence. The American worker has also been more individualistic and less class-conscious than his European counterpart and therefore less willing to give to his union permanent loyalty and attachment. His willingness to compete against other workers, particularly during times of depression, has tended to undermine union standards. But even to the union which has successfully overcome em-

ployer resistance and employee apathy, there remain the overhanging threats of rival unions and jurisdictional disputes. The importance which unions attach to union security measures stems largely, therefore, from the union's desire to protect itself as an institution against employers, employees, and other unions. Furthermore, the unions assert, union security is a natural concomitant of modern collective bargaining. The union, once it is chosen as collective bargaining agent for the employees, bargains for all the employees, and individual bargaining is precluded. Since all the employees benefit from the collective contract which the union negotiates, the unions argue it is only fair to require all the employees to bear their share of the load and to support the union by becoming members. This is the so-called "free rider" argument. Compulsory membership, the unions add, is the only way under collective bargaining to assure the worker of a voice in his working conditions.

The argument against union security points out that today labor's right to organize is recognized everywhere. Since employers are forbidden by law from preventing workers from joining unions, logically it is equally wrong for employers to compel workers to join unions. Furthermore, to force a man to join an organization against his will violates our democratic principles. If the union is efficient and honest and performs a truly useful service, it should be able to maintain its membership among the employees on a voluntary basis. Employee apathy and inroads by rival unions indicate that the union is failing in its job or is not really wanted by the employees; union security would therefore only perpetuate existing evils. Where membership is compulsory, the union leaders are less responsible and amenable to control by members; their assured position leads to favoritism and nepotism. Finally, it is said that to require an employee to join a union as a condition of employment is an unwarranted interference by private authority with the liberty of the individual, specifically, with his fundamental right to work, holding a job should not be denied or limited because the employee is or is not a member of a private organization.

As to the effects of union security arrangements upon the business enterprises in which they have been utilized, business men themselves, according to a recent study, are not in unanimous agreement, advantages and disadvantages both being recognized. The opinions of management men were summarized as follows:[4]

Advantages

Possible advantages under closed shop operation cited by industrial executives include:

[4]The study was made in November, 1952, by the National Industrial Conference Board, a research organization supported by industry.

1. Eliminates factional strife within the working force by giving a single union exclusive recognition and an assured status.

2. Improves discipline by holding the union responsible for actions of employees, all of whom must be members of the union and, therefore, answerable to the union officers.

3. Puts an end to periodic, short but troublesome interruptions to operation.

4. Ends the frequent demands by the union for concessions from the employer for the sole purpose of holding membership.

5. Tends to standardize wage costs.

6. Brings about a greater feeling of responsibility and interest in their jobs on the part of employees because of a voice in determining working conditions.

Disadvantages

Anticipated or experienced disadvantages of the closed shop as stated by industrial executives include:

1. Interferes with the employee's right to decide the question of membership or nonmembership in the labor union.

2. Makes employment contingent on maintenance of good standing in union, and consequently, commits the employee to permanent union membership.

3. Tends to create a labor monopoly.

4. Destroys discipline and efficiency by making the union officers seem more powerful than the foremen.

5. Places the union, which has neither investment in, nor responsibility for, the business, in a position where it can checkmate the management's operating policies.

6. Deprives management of the power to determine who shall be selected for employment.

7. Tempts the union officers to become arbitrary and unreasonable, because their status is assured.

C. *Statutory context.*

Until about twenty years ago, the attitude of the law toward the issue of union security was shaped almost entirely by judicial decision. The early common law view in the United States, after unions ceased to be regarded as criminal conspiracies, was, in general, that closed shop agreements were either invalid or unenforceable and that strikes or picketing to obtain such agreements were for an illegal purpose and hence could be enjoined. This was but one aspect of an overall judicial

attitude of hostility to and restriction of union activity. Gradually the courts modified their views as to what were proper labor objectives and methods. Eventually most state courts came to hold that closed shop or other union security arrangements were legitimate goals of labor and once obtained legally enforceable; likewise, strikes, picketing and other forms of economic pressure to achieve union security were, in general, lawful means to a permissible end.

It was perhaps inevitable that such a controversial issue in such a vital area of America life should eventually be the subject of legislation. Congress first dealt with the matter in 1934 when it amended the Railway Labor Act, orginally passed in 1926. Again in 1935 Congress in the National Labor Relations (Wagner) Act acted on the question. The difference between the two statutes is interesting. As to railroads, Congress in the Railway Labor Act flatly prohibited any form of union security, including the checkoff. As to all other businesses affecting interstate commerce, the Wagner Act specifically provided that the law did not prohibit employers and unions from entering into union security agreements. The difference in statutory treatment is attributable to the fact that the railway unions themselves, for reasons which seemed valid at the time, joined with the railroads in supporting the statutory ban on union security. The traditional union view on the closed shop, espoused by the American Federation of Labor, was reflected in the Wagner Act.

Commencing in 1944 the states began to prohibit, by constitutional amendments and statute, union security agreements. By 1947 there were about a dozen such legislative enactments among the states. These state laws had the effect of prohibiting union security agreements, not only in intrastate businesses, but also between unions and employers whose business affected interstate commerce. Consequently, there existed a serious doubt as whether, under familiar constitutional law principles, the state laws were valid insofar as interstate commerce was concerned.

In 1947 Congress passed the Labor-Management Relations Act (Taft-Hartley law) which both amended the Wagner Act and added new provisions of its own. Taft-Hartley dealt with union security in three principal ways. First, it made the union shop the maximum form of union security agreement which can be included in collective bargaining agreements; by necessary implication, the closed shop is prohibited. Restrictions were also imposed as to the circumstances under which an employee's loss of membership in the union results in loss of his job.[5]

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[5]As originally passed in 1947, Taft-Hartley provided for union shop authorization elections, conducted by the NLRB, in which the union had to win by a majority of the employees eligible to vote before it could even negotiate for a union shop. In the next four years the Board conducted over 46,000 such elections. Union shops were authorized in 97 percent of the elections with 78 percent of the eligible employees

Second, Taft-Hartley, in amending the NLRA, added a new Section 14 (b); this is the provision most relevant to our present topic. It provides as follows: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

This provision was explained in the Conference Report as follows:

> "Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called 'closed shop' proviso in section 8 (3) of the existing [original] act nor the union shop and maintenance of membership proviso in section 8 (a) (3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14 (b), contains a provision having the same effect."[6]

Third, Taft-Hartley added certain provisions dealing with the checkoff. Section 302 of the Act specifically permits the checkoff in industries affecting interstate commerce provided that "the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner."

The final statutory treatment of union security to which attention should be called occurred in 1951. In January of that year Congress

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(over 5 million) voting in favor of union security. It was obvious that time and money were being needlessly expended in holding the elections, and the Act was therefore amended in 1951 so that they are no longer required.

In 1952, a survey made by the Bureau of Labor Statistics of 1,653 collective bargaining agreements covering 5,550,000 employees disclosed that 62 percent of the workers were under union shop agreements, 14 percent under maintenance of membership arrangements and 24 percent were in an open shop.

[6]H.R. Rep. No. 510, 80th Cong., 1st Sess. 60 (1947).

amended the Railway Labor Act so as to specifically authorize the union shop and the checkoff, with certain restrictions. This time the railway unions, having gradually changed their position since 1934, afforded the primary impetus behind this change in the law.

D. *Litigation*

(1) *Constitutionality.* The constitutionality of the "right to work" statutes is now well settled. By state supreme court decision, the North Carolina act was upheld in 1947,[7] and those of Tennessee,[8] Nebraska[9] and Arizona[10] in 1948. The Nebraska, North Carolina and Arizona cases were affirmed in 1949 by the United States Supreme Court in two opinions[11] by Mr. Justice Black. As anti-climax, the supreme court of Virginia upheld that state's law in 1949[12] and like results were reached in Texas[13] and Florida[14] in 1950.

The United States Supreme Court opinions are, of course, the most authoritative. The unions argued, first, that the state laws abridged the unions' freedom of speech and right to peaceable assembly as guaranteed by the First Amendment. The Court was not at all impressed by this tenuous contention or the "rather startling" ideas on which it rested. Second, the unions argued that the state laws impaired the obligation of contracts made prior to their enactment contrary to Article 1, Section 10 of the Constitution. This contention, Black said, did not even merit discussion. The third argument of the unions was that the state enactments constituted a denial of the equal protection of the laws. So far as the Nebraska and North Carolina enactments were concerned, this argument found sufficient answer in the fact that both states prohibited discrimination against *union* as well as *nonunion* members. The Arizona "right to work" amendment to its constitution, however, only prohibited discrimination against nonunion workers. The existence of an anti-yellow-dog-contract law was considered by the Court in a separate opinion to satisfy the equal protection requirement, even though it was not certain Arizona would accord an equality of remedy for discrimination against union as well as nonunion members.

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[7]State v. Whitaker, 228 N.C. 352, 45 S.E. 2d 860 (1947).

[8]Mascari v. International Brotherhood of Teamsters, 187 Tenn. 344 (1948).

[9]Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 149 Neb. 507, 31 N.W. 2d 477 (1948).

[10]American Federation of Labor v. American Sash & Door Co., 67 Ariz. 20, 189 P. 2d 912 (1948).

[11]Lincoln Federal Labor Union v. Northwestern Iron & Metal Company, 335 U.S. 525, 69 Sup. Ct. 251 (1949), affirming the cases cited in notes 7 and 9, supra; American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 69 Sup. Ct. 258 (1949), affirming the case cited in note 10, supra.

[12]Finney v. Hawkins, 189 Va. 878, 54 S.E. 2d 872 (1949).

[13]Construction and General Labor Union v. Stephenson, 148 Tex. 434, 225 S.W. 2d 958 (1950).

[14]Local Union No. 519 v. Robertson, 44 So. 2d 899 (Fla. 1950).

The final argument made by the unions was that the state laws violated the due process clause of the Fourteenth Amendment in that they interfered with the "liberty of contract" of the employer and the union. The unions were thus asking the Court to apply for their benefit that due process of law philosophy which the Court had read into the Constitution around the turn of the century, under which the Court had invalidated scores of state laws of all sorts (over the vigorous protests of Justices Holmes and Brandeis), and which had finally been read out of the Constitution by the Court in the late thirties. Since many of the laws which had been invalidated under the old due process philosophy were laws which had been passed to benefit unions and workers generally, it must have required quite a straight face in 1949 for the unions to ask the court to return to the discarded version in these particular cases for their special benefit. At any rate, Black and the Court declined the invitation.

(2) *Picketing.* It is also well-settled, as a general proposition, that a state may validly enjoin even peaceful picketing which is conducted for the purpose of inducing a violation of the "right to work" statute. Prior to 1953 many state decisions had reached this result.[15] These cases were applications of the general principle, extracted from Supreme Court decisions[16] of recent years, that an "unlawful purpose" would defeat a union's right to picket peacefully and that picketing to coerce the violation of valid state laws and policies was for such an "unlawful purpose." These Supreme Court decisions represented a return to the "common law" view of picketing and a retreat from, or at least a limitation of, the "constitutional" view of picketing which the Court had enunciated in 1940 in *Thornhill v. Alabama.*[17] Under this latter view peaceful picketing was an exercise of free speech protected by the First and Fourteenth Amendments and could not be prohibited unless it constituted a "clear and present danger" of breach of the peace or destruction of life or property.

In 1953 the Supreme Court decided the case of *Local Union No. 10 v. Graham.*[18] In this case the defendants peacefully picketed their employer carrying signs which read "This Is Not A Union Job. Richmond

[15]Mascari v. International Brotherhood of Teamsters, 15 Labor Cases ¶ 64, 580 (Tenn. 1948); Local Union No. 159 v. Robertson, supra note 14; Stonaris v. Certain Picketers, 46 So. 2d 387 (Fla. 1950); Self v. Taylor, 235 S.W. 2d 45 (Ark. 1950); Sheet Metal Workers Local No. 175 v. Walker, 236 S.W. 2d 683 (Tex. 1951); Texas State Federation of Labor v. Brown & Root, Inc., 246 S.W. 2d 938 (Tex. 1952); Painters and Paperhangers Local Union No. 1018 v. Rountree Corporation, 194 Va. 148, 72 S.E. 2d 402 (1952); Miami Typographical Union No. 430 v. Ormerod, 61 So. 2d 753 (Fla. 1952).

[16]Building Service Union v. Gazzam, 339 U.S. 532, 70 Sup. Ct. 784 (1950); Teamsters Union v. Hanke, 339 U.S. 470, 70 Sup. Ct. 773 (1950); Hughes v. Superior Court, 339 U.S. 460, 70 Sup. Ct. 718 (1950); Giboney v. Empire Storage Co., 336 U.S. 490, 69 Sup. Ct. 684 (1949).

[17]310 U.S. 88, 60 Sup. Ct. 736 (1940).

[18]345 U.S. 192, 73 Sup. Ct. 585 (1953).

Trades Council". There was some testimony before the trial court to the effect that the picketing was intended to cause the employer to discharge the nonunion workers. Under Virginia's "right to work" statute, discharge because of nonmembership in a union would have subjected the employer to an action for damages. The trial court, in its decree enjoining the picketing, found that the "picketing . . . was conducted . . . for aims, purposes and objectives in conflict with the provisions of the Right to Work laws of the State of Virginia and [was], therefore, illegal . . ." The highest state court affirmed the decree, stating that the trial court was "plainly right." The Supreme Court also affirmed, stating: "Based upon the findings of the trial court, we have a case in which picketing was undertaken and carried on with at least one of its substantial purposes in conflict with the declared policy of Virginia. The immediate results of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on the general contractor to eliminate from further participation all nonunion men or all subcontractors employing nonunion men on the project."[19] Mr. Justice Douglas dissented on the ground that the record in the case was inadequate as to the purpose of the picketing, and said: "The line between permissible and unlawful picketing will therefore often be narrow and even tenuous. A purpose to deprive nonunion men of employment would make the picketing unlawful; a purpose to keep union men away from the job would give the picketing constitutional protection."

Just how narrow and tenuous the line can be is illustrated by comparing the *Graham* case with *Painters and Paperhangers Local v. Rountree Corporation*,[20] decided by the Virginia Court of Appeals while the *Graham* case was on the Supreme Court docket awaiting decision. In the *Rountree* case the union picketed the premises where nonunion painters were being employed, the picketers carrying signs reading: "This painting is unfair to the Painters and Paperhangers Local Union No. 1018, A.F.L., member of Richmond Trades and Labor Council." A decree enjoining the picketing was reversed, the highest Virginia court stating: "The purpose of the picketing avowed in the answer and in the motion to dissolve was to unionize the non-union painting contractor and his employees. The evidence does not disclose a different purpose. The charge that there was a purpose to compel the complainants to discharge the non-union painters to to compel the painters to join the union as a condition of their continued employment is not established by the evidence. No such demand or even suggestion was made by the de-

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[19]It would not appear to be necessary that the unlawful purpose be the only, or even the primary, purpose of the picketing. See Texas State Federation of Labor v. Brown & Root, Inc., supra note 15.

[20]Supra, note 15.

fendants to the complainants, to the contractor or to his men. If the peaceful publication of the facts in an effort to unionize the painters resulted in economic pressure on the complainants, as employers of the painters, that result did not make the purpose unlawful or the picketing illegal. It cannot be said that picketing otherwise legal becomes illegal because of the possibility that as a result of it a person affected by it may do an unlawful act, unless the purpose of the picketing is to compel the doing of such an act. . . . The record here fails to disclose . . . any violation of the Right to Work statute. . . ."

An analysis of these cases has aptly noted, "What practical difference exists between the two purposes neither the Virginia court nor Mr. Justice Douglas explained, but the cynically inclined might see in it nothing more than the fact that the same activity may be proper if described one way but improper and prohibited if otherwise described. In practice every instance of picketing of a partially nonunion employer has some elements of both purposes—that of informing union members and that of coercing the employer to replace nonunion men with union members."[21]

The point is further illustrated by two 1952 Florida cases. In *Hotel & Restaurant Employees v. Cothron & Felton*,[22] the union made an unlawful demand for a closed shop contract. The employer responded by discharging all the members of the union. The union then commenced picketing the employer's premises. A decree enjoining the picketing was reversed by the Supreme Court of Florida for the reason that the picketing was not in protest of the employer's refusal to sign the closed shop contract but in protest of the discharge of the employees because they belonged to the union. In *Miami Typographical Union No. 430 v. Ormerod*,[23] a typical sign carried by the picketers read: "Geo. Shade, Sr. 219 N.W. 58th St. SCABBING at Miami Herald Where Union Printers Have Been On Strike Over 2 Years." The Florida Supreme Court upheld the chancellor's finding that the picketing was not for the purpose of informing the public of the differences between the union and the employer but that the real purpose was to force the employer to coerce his employees to join the union.

The reader can at this point endeavor to apply for himself the "unlawful purpose" test under a "right to work" statute. In *Construction and General Labor Union v. Stephenson*[24] the picket carried a banner reading as follows: "Amarillo Building and Construction Trades Council protest the employment by Ira Stephenson and Company of non-

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[21]"Right to Work" Statutes and the "Unlawful Purpose" Doctrine, 2 Journal of Public Law 210, 212 (1953).

[22]59 So. 2d 366 (Fla. 1952).

[23]Supra, note 15.

[24]Supra, note 13.

union labor on this job, and the failure of the employees on this job to join unions affiliated with the Amarillo Building and Construction Trades Council." In *Woodard v. Collier*,[25] a Georgia case, both union and nonunion employees were employed. When the picketing began, the union employees left the job. Subsequently the nonunion employees left, whereupon the union employees returned. Query: was the purpose of the picketing in these two cases to inform the public and unionize the employees, lawful under the *Rountree* decision, or was the purpose to coerce a violation of the Texas and Georgia "right to work" statutes, unlawful under the *Graham* decision? The reader may be inclined to agree with the comment that the "lawful purpose" test appears to be "little more than a semantic vehicle for giving free rein to the economic predilections of the individual trial courts."[26]

(3) *Prohibited agreements.* The typical "right to work" statute declares that employment shall not be denied or terminated on account of membership or nonmembership in a labor union and then provides that agreements or contracts to accomplish such a result are either void, illegal, unenforceable or constitute a conspiracy, as the case may be. Several state decisions have dealt with the problem of whether the agreement in question was prohibited under the statute or not.

In *Self v. Taylor*,[27] the union and the employer, prior to passage of the Arkansas "right to work" law, had provided for a closed shop in their collective bargaining agreement which was of a year's duration, renewable automatically. The union's constitution prohibited its members from working with nonunion men. After the passage of the law, the employer refused to sign a contract containing the closed shop provision. The union then offered a cunning contract in which all reference to the closed shop and union shop was eliminated; it did, however, contain a provision for cancellation at any time by either party upon sixty days' notice. The employer, who had in his hire several nonunion men, refused to sign this contract after the union made it clear that it would exercise its right to cancel if he did not discharge them. Picketing followed which the employer sued to enjoin. The Arkansas Supreme Court affirmed the injunction, stating that the contract "in the circumstances of this case is obviously designed to achieve indirectly a result which the law says is illegal. . . . The undisputed proof amply supports the Chancellor's finding that the only purpose of the picketing was to force appellee to continue a closed shop either contractually or non-contractually as a matter of economic self-preservation. . . . The contract itself ; the circumstances of its proposal; the Constitution of the interna-

25210 Ga. 239, 78 S.E. 2d 526 (1953).

26Supra, note 21. For cases subsequent to Graham, see IAM Local 924 v. Goff- McNair Motor Company, 264 S.W. 2d 48 (Ark. 1954); Treasure, Inc. v. Hotel & Restaurant Employees, 72 So. 2d 670 (Fla. 1954).

27Supra, note 15.

tional union . . . as made in effect a part of the contract; the testimony of union representatives that their members would not work under the contract if non-union members were employed—all of these things must be considered. . . . Unless we blind ourselves to reality it is apparent that a closed shop is the union's objective in picketing."

In *Sheet Metal Workers Local No. 175 v. Walker*,[28] the union picketed the employer after his refusal to sign a contract proffered by the union. The contract would have required the employer to employ only journeymen sheet metal workers and registered apprentices whose qualifications as such were recognized by the union. It provided that the union would furnish all employees required by the employer but also provided that the employer could secure employees from other sources if not furnished by the union after 48 hours notice; in the latter event the employees obtained by the employer should comply with the requirements of membership in the union. The Texas Court of Civil Appeals found that these contract terms "clearly provide for a closed shop, contrary to the laws of Texas." Another part of the contract stated that any provision of the agreement contrary to state law would not be effective but the union refused to write into the contract that a closed shop was not intended. The court said that it would be "recognizing form rather than substance" to say that the latter provision prevented a closed shop agreement.

Similarly, in *Commonwealth v. Local Union No. 10*,[29] the Virginia chancellor, without opinion, granted an injunction restraining the union from "negotiating for, entering into, or carrying out a contract, agreement or understanding, express or implied, containing the following provision: 'The employer will employ Journeymen and Apprentices who are in good standing in the Local Union unless the Local Union fails to supply an adequate number on request.'; or any other similar provision whereby any employer would maintain a union or closed shop . . . " It will be seen that the union security arrangement sought by the union in this and the preceding case was the preferential hiring system. They offer an interesting comparison with *Ketcher v. Sheet Metal Workers International Association*,[30] in which the contract provided for the union "to furnish at the request of the Employer, duly qualified journeymen sheet metal workers and registered apprentices in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this agreement." On motion to dismiss, the district judge noted "we cannot go

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[28]Supra, note 15.

[29]24 Lamor Cases ¶ 67, 823 (1953).

[30]115 F. Supp. 802 (USDC E.D Ark. 1953). In Nevada an Attorney General's Opinion of 1952 held that the "right to work" statute did not prohibit the referral of only union members by the state employment service where this was desired by the employer. 4 Labor Law Reporter, Nevada, ¶ 41,025.

beyond the complaint and the contract, and we can see nothing in them from which any illegality can be inferred; we disagree . . . that the agreement of the union . . .amounted to a stipulation for a closed or union shop. . . . "

Local No. 234 *v. Henley & Beckwith*[31] gave the Florida Supreme Court a much simpler situation. There the contract provided that none of the union's members would work for employers (plumbing and pipefitting contractors) who were not parties to the agreement and, further, the employer agreed that he would hire no journeymen who were not members in good standing of the union. The Florida court naturally held the foregoing provision to be one for a closed shop agreement, and the only odd wrinkle in the case is that it was the union rather than the employer which alleged that the contract was invalid.

In *Local 924 v. Goff-McNair Motor Company,*[32] the contractual provision in question was as follows: "Union Members. The refusal of any or all employees who are members of the union to work with an employee who is not a member of the union will not be considered as a violation of this agreement." This provision, coupled with the testimony of the union representative as to how the provision would be applied, led to the finding of the trial court, approved by the Arkansas Supreme Court, that the subsequent picketing was for the purpose of enforcing a closed shop.

Typically the agreement which is alleged to be invalid is found in the collective bargaining agreement between the employer and the union representing the employees. In *Finney v. Hawkins,*[33] however, the contract was between a print shop and a Building and Construction Trades Council for the printing and publishing of a labor journal. The labor organization was contracting not in the capacity of a bargaining agent but as a customer of the print shop. The contract provided that only union labor would be employed. The Virginia "right to work" statute was found to be applicable and the point does not seem to have been argued that the contracts and agreements at which the statute was directed were collective bargaining contracts. In *Fackler v. Brotherhood of Painters,*[34] on the other hand, the contract was one between a general contractor and a painting subcontractor and provided that all painting was to be done by union men. The Tennessee Court of Appeals held that such a contract was not prohibited under the "right to work"

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[31]66 So. 2d 818 (Fla. 1953).

[32]Supra, note 26. In Arkansas, an Attorney General's Opinion of 1950 held that a strike settlement favoring union employees with seniority over nonunion employees with less service was not a form of discrimination prohibited by the statute. 4 Labor Law Reporter, Arkansas, ¶ 41,025.

[33]Supra, note 12.

[34]____S.W. 2d_____ (Tenn. 1954), 26 Labor Cases ¶ 68,559.

statute, even though the use of union men would of necessity exclude the use of nonunion men.

(4) *Contracts excepted.* The "right to work" statute typically provides that it shall not apply to contracts in effect at the time the law is passed. In *A.F.L. v. Roane-Anderson Co.*,[35] the Tennessee Supreme Court held that a closed shop contract executed prior to the passage of the law, but which did not become operative until a date subsequent to the effective date of the law, was invalidated by the passage of the law.

The Mississippi statute is made applicable to contracts "thereafter entered into and to any renewal or extension of an existing contract thereafter occurring." The Tennessee statute is practically identical except that it does not contain the last two words. In *Mascari v. Teamsters Local Union No. 667*,[36] the chancellor held the Tennessee statute applicable to a contract which was entered into for a period of one year but provided for automatic continuation from year to year unless notice was given. In *Phillips v. Stove Mounters International Unions*,[37] a Tennessee circuit court reached a contrary result, drawing a distinction between an extension or renewal of the contract and a continuance of the contract until terminated according to its terms. Closed shop provisions in the latter type contract were held to be not affected by the "right to work" statute.

(5) *Severability of illegal provision.* In several cases the question has arisen whether a union security provision prohibited by a "right to work" statute renders the entire contract invalid. The basic approach is not different from that of general contract law, that is, the validity of the remaining part of the contract will depend upon whether the illegal provision is so integrated and interdependent that the contract must be considered to be an indivisible one.

Lewis v. Jackson & Squire[38] offers the novel spectacle of John L. Lewis suing to enforce a bargaining contract. The contract applied to certain coal mines in Arkansas and provided that the mine owners should make specified payments into the union welfare and retirement fund. It also provided for a union shop, unlawful under the Arkansas "right to work" statute. Upon failure of the various mine owners (one of whom, incidentally, was a Mississippi corporation) to make the welfare payments, the trustees of the fund brought suit to collect the unpaid amounts. On motion to dismiss, the federal court held that the entire contract was unenforceable because of the union shop provision, which was described as being an "essential and inseparable part" of the agreement.

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[35] 185 Tenn. 363, 206 S.W. 2d 386 (1947).
[36] 13 Labor Cases ¶ 64,036 (Tenn. 1947).
[37] 17 Labor Cases ¶ 65,537 (Tenn. 1949).
[38] 86 F. Supp. 354 (USDC WD Ark. 1949).

In re Receivership of Port Publishing Company[39] presented the question of severability of the closed shop provision from the provisions dealing with working conditions, hours, rates of pay, training of journeymen, overtime, vacation and severance pay. The North Carolina Supreme Court held that the latter provisions were "severable and may be sustained irrespective of the invalidity of the 'closed shop' provisions of the contracts." On the other hand, the Florida Supreme Court in *Local No. 234 v. Henley & Beckwith,*[40] held that the closed shop provisions of the contract were not divisible from the other provisions concerning wages, hours and conditions of labor. It appeared that under the latter provisions union members were to be paid at a certain time, that union members should correct faulty work on their own time, and that union members should not be subject to physical examinations. The court said it was "impossible to conclude that . . . the closed shop agreement . . . can be entirely eliminated from the contract and still leave a valid working arrangement fairly reflecting the original mutual understanding between the parties."

In the *Ketcher* case,[41] the action was for conspiracy to induce a breach of contract and one defense was that the contract provided for a closed shop and was therefore illegal in its entirety. After holding that the contract did not provide for a closed shop, the federal court stated that "even if it did, the validity of the contract as a whole would probably be saved by the provision . . . which renders inoperative any illegal portion of the contract; . . . certainly said provision shoud be given that saving effect for purposes of the instant motion [to dismiss] . . . ." A comparison of the *Ketcher* case with the *Walker* case,[42] where the contract also contained such a provision, indicates that the nature of the action and the degree of evidence available are factors in deciding whether a severability clause of the contract will be given effect.

(6) *Remedies and Parties.* The remedies which the "right to work" statutes provide are both civil and penal. The law may authorize damages for denial or loss of employment due to violation, it may provide for injunction to restrain violations, it may make the violation of the statute a misdemeanor, or it may provide for a combination of these remedies. The chart below summarizes the remedies afforded by the

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[39]231 N.C. 395, 57 S.E. 2d 366 (1950).
[40]Supra, note 31.
[41]Supra, note 30.
[42]Supra, notes 15 and 28.

various "right to work" statutes.[43]

The statutory provisions do not necessarily provide the final answer, however. In *State v. Bishop*,[44] the defendant was indicted and convicted for having violated the North Carolina statute. The only remedy provided for in the law was an action for damages. The court nevertheless upheld the conviction, applying the common law rule that when a statute, passed in the public interest, commands an act to be done or forbids an act, and no penalty is expressly provided for its non-observance or breach, the offending person may be punished as for a misdemeanor. The Florida constitutional "right to work" provision of 1944 makes no mention of any remedy for its enforcement. An earlier 1941 statute made it unlawful to coerce or intimidate any employee in the enjoyment of his legal rights. In *Local Union No. 519 v. Robertson*,[45] the Florida Supreme Court, in upholding an injunction against picketing, commented upon the possible consequences to the employer had he agreed to and enforced a closed shop contract, considered the constitutional and statutory provisions together and stated that the employer would face the possibility of criminal prosecution. The court then added, "Furthermore, he would face the possibility of a civil suit for damages by the discharged employees, for by discharging them on account of failure to become union members, he would certainly be guilty of denying or abridging their constitutional right to work." The Texas "right to work" statute likewise provides no remedy for its enforcement. In *Local Union No. 324 v. Upshur-Rural Electric Cooperative Corp.*,[46] the Texas Court of Civil Appeals stated: "Since neither penalties nor remedial procedure is provided in the Act, the injunctive power of the courts may protect against invasion of such rights as are granted thereby." It will be seen that in the latter three cases the courts, in the absence of statutory provisions, have been able to make available the civil remedies of damages

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State	*Damages*	*Injunction*	*Misdemeanor*
Alabama	X		
Arizona	X	X	
Arkansas			X
Florida	None in Constitution		
Georgia	X	X	X
Iowa		X	X
Louisiana		X	
Mississippi	X		
Nebraska			X
Nevada	X	X	X
North Carolina	X		
North Dakota	None in statute		
South Carolina	X	X	X
South Dakota			X
Tennessee			X
Texas	None in statute		
Virginia	X	X	X

[44] 228 N.C. 371, 45 S.E. 2d 858 (1947).

[45] Supra, note 15.

[46] 261 S.W. 2d 484 (Tex. 1953).

and injunction and also a criminal sanction for the enforcement of the "right to work" statute.

The *Upshur-Rural* case is of interest for another reason. One usually thinks of a "right to work" statute as being for the protection of nonunion workers and it is true that almost all of the cases arise out of the prohibition of union security arrangements which discriminate against nonunion members. It should be remembered, however, that the "right to work" statute typically prohibits discrimination because of *membership,* as well as *nonmembership,* in a labor union. Were this not so, the statute might well be held to be a denial of equal protection of the law. The *Upshur* case was an action by two employees alleging that they had been discharged by the employer because of their union membership, and seeking a mandatory injunction requiring the employer to reinstate them to their jobs. The Texas court held that the employees had not sustained the burden of proving that their discharge was because of their union membership. The interesting thing about the case, however, is the implicit holding that such a remedy would be available in a proper case to union members.[47]

In sharp contrast and worthy of special mention is the decision of the Georgia Supreme Court in *Sandt v. Mason.*[48] Section 2 of the Georgia "right to work" statute purportedly puts membership and non-membership in a union on legally equal footing. Sections 4 through 7 protects the rights of nonunion members only. Section 8 provides for injunctions (with damages) for violation of Sections 4 through 7 and Section 9 makes violation of Sections 5 through 7 a misdemeanor. The action was by three employees alleging that they had been discharged because of their union membership, and seeking reinstatement and damages. The Georgia court first noted that the remedial provisions of Sections 8 and 9 were not applicable to Section 2, that Section 2 amounted "to no more than a statement of the public policy" of the state, and that the right of the employees to any relief would have to rest on other provisions of state law. The court then held that the powers of equity were not available since the remedy sought by way of injunction would require the performance of affirmative acts by the employer. Finally, as to damages, the court held the actual loss from any breach of the contract would be the measure, that one week's salary ($25 for two plaintiffs and $40 for one) would be the most recoverable since the employment was on a week

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[47]In a case where the employer was engaged in a business affecting interstate commerce, the Texas Court of Civil Appeals recently held that a state court had no jurisdiction under the "right to work" statute to issue a mandatory injunction requiring reinstatement of employees discharged because they joined a labor union; since this constituted an unfair labor practice under Taft-Hartley, the NLRB has exclusive jurisdiction. Leiter Manufacturing Company v. International Ladies' Garment Workers' Union, ... S.W. 2d ....., 26 Labor Cases ¶ 68,631 (1954).

[48]208 Ga. 541, 67 S.E. 2d 767 (1951).

to week basis, but that no recovery could be had in this case because there was no allegation that the salary was not paid up to the time of the discharge. For all practical purposes, therefore, it may fairly be said that Georgia offers no adequate remedy to union members who are discharged because of their membership while at the same time Georgia law makes discrimination against nonunion members not only subject to an injunction with damages but also a misdemeanor punishable by fine up to $1,000, imprisonment not to exceed 6 months, work on the chain gang for not more than 12 months, or more than one of the above punishments. The writer is of the opinion that there is a serious question as to whether the Georgia "right to work" statute under these circumstances affords equal protection of the law. Whether the opprobrium for this state of affairs should be cast upon the Georgia legislature or the Georgia Supreme Court, this case is a good example of the kind of "equal justice" which has traditionally caused labor unions to be suspicious of legal processes.

Two cases raise the question of whether the union was a proper party in the particular action under the "right to work" statute. In *Miami Laundry Company v. Local Union No. 935*,[49] the union brought an action seeking to restrain the employer from interfering with the employees' rights to join a labor organization, to secure the reinstatement of discharged employees, and to obtain a declaration of employees' rights. The Florida Supreme Court dismissed the action, stating: "We fail to find any rights, privileges or immunities which the bill of complaint discloses have been invaded or infringed which are rights, privileges or immunities or guaranteed to any labor organization as such. These rights and guaranties exist only in favor of the individual employee and do not inure to the benefit of the union in which he holds membership. They are purely personal to the employee and may be protected under the facts and circumstances alleged in the instant case only in an action brought by the employee."

Dukes v. Brotherhood of Painters[50] was an action by a union member against his union for having maliciously caused his discharge by falsely informing his employer that he had been expelled from the union. The second count was laid under two sections of the Tennessee "right to work" statute which prohibited discrimination by "any person, firm, corporation or association of any kind." The Tennessee Supreme Court sustained a demurrer to the second count, stating: "These two Sections of the Code, as relied upon by the plaintiff, are not applicable herein *because they are directed toward the employer* and not to any situation as represented by the declaration herein." (emphasis supplied). By impli-

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[49] 41 So. 2d 305 (Fla. 1949).
[50] 191 Tenn. 495, 235 S.W. 2d 7 (1950).

cation, it is arguable that unions do not come within the quoted statutory language. In *Finney v. Hawkins,* however, in which damages were awarded against the employer and a labor organization, the Virginia statute, like the Mississippi one, provided for damages recoverable from "such employer and from any other person, firm, corporation or association acting in concert with him. . . . "

The remedy of declaratory judgment was held by the Tennessee Supreme Court to be unavailable to an employer in *Combustion Engineering Co. v. Thompson,*[51] where an employee threatened to bring suit under the "right to work" statute if he was discharged pursuant to the collective bargaining agreement and the union threatened to bring suit if he was not discharged.

(7) *The checkoff.* Many state "right to work" statutes, like that of Mississippi, contain provisions which regulate or prohibit the checkoff.[52] To the extent that these provisions apply to industries affecting interstate commerce, there exists the as yet unsettled question of their constitutionality. This question is not foreclosed by the decisions on constitutionality previously discussed, since they dealt with the validity of the state laws from the viewpoint of their prohibition of union security agreements requiring membership. The validity of the checkoff provision is a somewhat different question for two reasons. First, Section 302 of the Taft-Hartley law is cast in language indicating that Congress intended specifically to authorize and permit the checkoff, with the limitations prescribed, in industries affecting interstate commerce. Second, as to the checkoff there is no provision in the federal law comparable to Section 14 (b), *supra,* by which Congress authorized states to prohibit all forms of union security membership agreements even though Congress itself had not done so. These statutory differences make possible the invalidation of a state checkoff provision on the familiar ground that it is in conflict with the federal law. Further, they lend support to the argument that Congress has preempted the field of checkoff regulation, insofar as industries affecting interstate commerce are concerned, and hence precluded any state regulation on the subject. The writer has been unable to find any cases on this point which have arisen under "right to

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[51]191 Tenn. 98, 231 S.W. 2d 580 (1950).

[52]In the absence of specific prohibition, an Attorney General's Opinion in 1947 held that the Arkansas "right to work" statute did not preclude the checkoff if authorized by employees individually or under a bargaining agreement. 4 Labor Law Reporter, Arkansas, ¶ 41,025. Similarly, an Attorney General's Opinion of 1952 held that an agreement requiring nonunion employees to pay union dues was lawful under the Nevada "right to work" statute. 4 Labor Law Reporter, Nevada, ¶ 41,025. However, an Attorney General's Opinion in 1952 held that a checkoff system operated through a credit union was illegal under the North Carolina statute which in terms dealt with the checkoff. Similarly, another Attorney General's Opinion in the same state in 1952 held that an "agency shop" clause under which nonunion members were assessed a "service charge" in the form of dues for representation was unenforceable. 4 Labor Law Reporter, North Carolina, ¶ 41,025.

work" statutes. However, in *Utah v. Montgomery Ward & Co., Inc.*,[53] the Supreme Court of Utah invalidated a statute dealing with the check-off, on both grounds, that it was in conflict with the Taft-Hartley law and also that Congress had preempted the field and closed it to state regulation.

(8) *Railway Labor Act.* The Mississippi statute, by expressly excepting from its operation employers and employees under the jurisdiction of the federal Railway Labor Act, has wisely precluded a repetition of the time consuming litigation which has occurred in other states. As noted earlier, the Railway Labor Act was amended in 1951 to specifically permit union shop agreements. No provision comparable to Section 14 (b) of the amended NLRA authorizes states to prohibit such agreements. In *Matter of Florida East Coast Ry. Co.*,[54] the federal district court held that this provision of federal law took precedence over the Florida "right to work" statute as to a railroad which operated in interstate commerce. There would seem to be no doubt as to the correctness of this result.[55]

In two cases, however, lower state courts have not been so willing to admit federal supremacy. In *Hanson v. Union Pacific Railroad Co.*,[56] a Nebraska trial court held that, even though the Railway Labor Act permits union shop contracts, nevertheless the discharge of employees under such a contract was unlawful in Nebraska because of the "right to work" statute. In *Sandsberry v. Gulf, Colorado and Sante Fe Railway Co.*,[57] a Texas trial court reached the conclusion, incredible to the point of being comic, that the provision of the Railway Labor Act authorizing the union shop was itself unconstitutional as exceeding Congress' power to regulate interstate commerce. One suspects that railroad lawyers who knew better, for purposes of delay, took advantage of two judges called upon to decide cases beyond their usual experience. At any rate, such judicial nonsense can not occur under the Mississippi statute.

E. *Conclusion.*

A geographical look at the states which have "right to work" statutes shows one group of two contiguous Southwestern states—Arizona and Nevada; another group of four contiguous Middlewestern states—North and South Dakota, Nebraska and Iowa; and finally, a group of eleven states comprising the entire Southeast United States within a perimeter

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53233 P. 2d 685 (Utah 1951), cert. denied 342 U.S. 869, 72 Sup. Ct. 111 (1951).

5424 Labor Cases ¶ 67,806 (USDC SD Fla. 1953).

55Two federal district court decisions remanded to state courts suits alleging that a railroad union shop would contravene a state "right to work" statute. Sandsberry v. Gulf, Colorado and Santa Fe Ry. Co., 114 F. Supp. 834 (USDC ND Tex. 1953); Allen v. Southern Railway Co., 114 F. Supp. 72 (USDC WD N.C. 1953).

5625 Labor Cases ¶ 68,095 (1954).

5725 Labor Cases ¶ 68,128 (1954).

made up of Virginia, Tennessee, Arkansas and Texas. The central fact to be noted from this geographic distribution is that all of these states are historically rural and agricultural; they are states in which urbanization and industrialization, if they exist at all, are comparatively recent developments.

The area composed of the eleven Southeastern states is in the midst of a great industrial revolution. Promotional programs are under way at all levels seeking to attract capital investment. One of the factors which persuades industry to locate in the South is a cheap, docile labor supply. As the industrialization of the South continues, however, it is inevitable that the unions will seek to organize the new employee groups. As yet, these groups are not sufficiently defined or numerous so as to constitute a force with which political leaders must reckon; labor organization, generally speaking, is in an inchoate stage. It is understandable, therefore, that political power in the South today reflects and is more responsive to the point of view of management groups, and that this political power should be used to deter unionization. The "right to work" statutes, in this context, are seen as one manifestation of an effort by Southern business and political leaders to obtain the benefits of industrialization without at the same time acquiring the disadvantages and evils, real or fictional, of labor unions. The extent to which this effort will be successful will be interesting to watch in the years ahead.

A Glimpse of Motion Pictures and the First Amendment

Within the framework of our Constitution there have been few causes deemed as significant as the struggle for freedom of expression. The First Amendment provides that Congress shall make no law abridging the freedom of speech or of religion.[1] The advocates of this freedom maintain that ideas, thoughts, and expressions emanating from man must be encouraged, welcomed, and protected if we are to continue to walk along the democratic road. The struggle for freedom of expression might be said to form the basis for the settlement of our country, since it was a catalytic agent lending impetus to the flight from the all-powerful Star Chamber that brought many of our forefathers to this New World. Our courts have repeatedly taken the position that freedom of expression should be allowed unless the expression is of such a nature as to threaten the structure designed to protect this freedom.[2] As has been said, the three great rights, *i.e.*, impartial trial by jury, free speech and free press were deemed particularly important by the Pilgrim fathers.

This ardent belief in a right to freedom of expression was the reason for the creation of the First Amendment. Before we pursue its development, it seems well to point out that in the *Mutual Film Corporation* case[3] our Court stated that picture shows were not within the protection of the First Amendment. The case was tried to test the validity of a state statute which required licensing as a condition precedent to presentation. The licensing board was to pass only such films as were of a moral, educational, or amusing and harmless character. The Court said that ". . . since the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, [it was] not to be regarded . . . as part of the press of the country, or as organs of public opinion." By this case, in 1915, moving pictures were completely eliminated from consideration in connection with the First Amendment until thirty-three years later.[4] The development of the First Amendment was oblivious to the consideration of motion pictures.

It seems clear and reasonable that the courts have not, and should not, consider the freedom of expression as guaranteed in the Constitution as absolute[5] and unlimited.[6] Prior to 1925 several states had free speech and free press provisions in their constitutions.[7] They were free to interpret these provisions as they saw fit. While these states were making their own rules the Federal courts were busily trying to reconcile the freedoms granted in the First Amendment with the restrictions placed on speech by wartime legislation. From this conflict of principle came Holmes' now famous "clear and present danger" doctrine.[8] "The

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[1]U. S. *Const. Amend.* I

[2]Schenck v. United States, 249 U.S. 47 (1919).

[3]Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230 (1915).

[4]United States v. Paramount Pictures, 334 U.S. 131 (1948).

[5]Schenck v. United States, *supra* note 2. Holmes said, "freedom of speech would not protect a man in falsely shouting fire in a theater and causing a panic."

[6]Whitney v. California, 274 U.S. 357 (1927). The Court held that the First Amendment protection did not extend to permit "utterances inimical to the public welfare, tending to incite to crime. . . ." A state, with its police power, could curtail the speech before it went that far.

[7]Miss. Const. Art. III, § 13.

[8]Schenck v. United States, *supra* note 2.

question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent."[9] To say that this rule did little to draw a distinct line between the freedoms as guaranteed by the First Amendment, and the restrictions on those freedoms, is an understatement.[10] It did not provide a positive yardstick by which to measure.[11] Nor did the Court define "circumstances," "nature," "clear danger," "present danger" or "substantive evils."[12] It seems that the clear and present danger test was only a standard to be used when a free speech case was to be decided.[13]

The next major statement by the Supreme Court regarding the First Amendment came six years after the announcement of the clear and present danger rule,[14] and ten years after the Court had said that moving pictures were not within the orbit of the First Amendment.[15] In the case of *Gitlow v. United States*[16] the Court said that the First Amendment prohibitions against Federal action also applied, by virtue of the Fourteenth Amendment, to action by the states; and thus the right or duty of the Federal Government to protect freedom of speech and of the press from state abuse was recognized. The Court said that if the First Amendment were literally interpreted, then free speech would become the "scourge of the republic. . . . That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrup public morals, incite to crime, or disturb the public peace, is not open to question."[17]

Exactly where the line was to be drawn, however, was never stated precisely by any writer, jurist, or court. The Supreme Court itself said, as late as 1941[18] that it had not yet fixed the standard by which it could determine when the danger would be "clear," or how remote the danger might be and still be "present." The rule could only provide guidance;[19] and the facts and circumstances of each case were to be examined to be sure that the threat of danger was sufficiently imminent to justify punishment or curtailment of speech.[20]

Of course, the states were obliged to follow the lead of the Federal judiciary after the *Schenck*[21] and *Gitlow*[22] cases. Illustrative of what the states said with regard to the First Amendment guarantees is a statement made by the Mississippi court in a newspaper contempt proceeding. "Freedom of speech includes the freedom to speak unwisdom or even heresy. Others may despise the speech but they may not despise the freedom. . . . The citizen has the constitutional right to be vulgar.

9Schenck v. United States, *supra* note 2.
10CHAFFEE, FREE SPEECH IN THE UNITED STATES 80 (1941).
11MEIKLEJOHN, FREE SPEECH AND ITS RELATIONS TO SELF-GOVERNMENT 28 (1st ed. 1948.)
12*Ibid.*
13CHAFFEE, *op. cit. supra* note 10.
14Schenck v. United States, *supra* note 2.
15Mutual Film Corp. v. Industrial Commission of Ohio, *supra* note 3.
16268 U.S. 652 (1925).
17Gitlow v. United States, 268 U.S. 652 (1925).
18Bridges v. California, 314 U.S. 252 (1941).
19*Ibid.*
20Pennekamp v. Florida, 328 U.S. 331 (1946).
21Schenck v. United States, *supra* note 2.
22Gitlow v. United States, *supra* note 17.

Our devotion to free speech bespeaks a confidence that truth will prevail over error and that it can take care of itself in any crowd of baser thoughts."[23]

Although the First Amendment has prevented punishment for utterances *after* they were made unless a "clear and present danger" existed or resulted from the expression, it has historically provided[24] almost complete immunity from *prior* restraints or censorship. To say the least, freedom from censorship has enjoyed a greater Constitutional protection than freedom from punishment. [25]

It is obvious that the "clear and present danger" rule did not furnish a positive, workable formula, but, at best, only a guide and that, as the rule itself stated, the circumstances and facts of each case were examined to see whether or not there was enough danger or harm to justify a curtailment of the Constitutional privilege. It has been used to restrict freedom of expression when the right of expression was exercised for the purpose of inciting to crime,[26] such as a breach of the peace[27] or the overthrow of the Government by unlawful means,[28] or resisting war measures of the Government,[29] or commenting on pending judicial action.[30] On the other hand, the Court has held the First Amendment guarantees violated when the expression showed disrespect to the flag of the United States,[31] or prohibited the distribution of literature of any kind at any time, at any place, and in any manner without a permit from a city official,[32] or absolutely prohibited the distribution of handbills on public streets or in parks,[33] or made the right to have a parade on the streets for the purpose of communicating ideas depend on a permit which might be refused by a local official on his opinion that the parade might cause "riots, disturbances or disorderly assemblage,"[34] or prohibited house to house canvassing except by permit.[35]

Thus developed the First Amendment and the clear and present danger rule up to 1948. In that year the Court, for the first time since 1915, discussed motion pictures in connection with a case involving freedom of expression. In *United States v. Paramount Pictures*[36] the

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[23]Sullens v. State, 191 Miss. 854, 4 So. 2d 356 (1941).

[24]Near v. Minnesota, 283 U.S. 697 (1931). It was held that a statute providing for the abatement, as a public nuisance, of the business of regularly or customarily publishing or circulating "a malicious, scandalous, and defamatory newspaper, magazine, or other periodical," by process of injunction against further publication, unless the owner or publisher showed that the truth was published with good motive and for justifiable ends, as applied to the owner or publisher of a newspaper periodical who conducted a business of publishing scandalous and defamatory matter, was held inconsistent with the constitutional guarantee of liberty of the press.

[25]Lovell v. Griffin, 303 U.S. 444 (1938); Schenck v. United States, *supra* note 2; and Patterson v. Colorado, *supra* note 7.

[26]Whitney v. California, 274 U.S. 357 (1927).

[27]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[28]Schenck v. United States, *supra* note 2.

[29]Abrams v. United States, 250 U.S. 616 (1919).

[30]Pennekamp v. Florida, *supra* note 20.

[31]Taylor v. Mississippi, 319 U.S. 583 (1943).

[32]Lovell v. Griffin, *supra* note 25.

[33]Nichols v. Massachusetts, 308 U.S. 147 (1939).

[34]Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939).

[35]Lovell v. Griffin, *supra* note 25.

[36]334 U.S. 131 (1948). It seems clear that this statement was mere dicta, inasmuch as the point involved in the case was under the Sherman Anti-Trust Law. See 24 NOTRE DAME LAW. 114 (1928); 20 So. CALIF. L. REV. 1 (1946); and 97 U. OF PA. L. REV. 234 (1948).

Court, in one statement of dictum, casually stated that moving pictures were certainly within the protection of the First Amendment. The question of censorship was not even in issue in the case. Logically, any later First Amendment decisions should include moving pictures. On the contrary, even though it was said that moving pictures were included within the First Amendment;[37] and even though it had been said that any regulation which subjects communications to license infringes the right of free speech;[38] and even though prior restraint had been especially condemned;[39] still the old decision of 1950[40] had not been overruled. It must be presumed, in the absence of any other statement, that the reason given in the earlier case[41] was still valid, *i.e.,* that since "the exhibition of moving pictures is a business, pure and simple,[42] originated and conducted for profit, like other spectacles, [it is] not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion."

It would be misleading not to point out that, although moving pictures were excluded from the protective cloak of the First Amendment so far as censorship was concerned, very serious effort was being made to bring them within the protection of freedom of expression.[43] Writers argued that, following the *Gitlow* case[44] there was no longer any reasonable basis whatsoever for denying Federal protection against state censorship of motion pictures.[45] The decision in the *Paramount* case, *supra,* surprisingly enough, was not used as the basis for the protection of freedom of expression under the First Amendment relative to motion picture censorship.

Both aspects of the problem were changed in the years immediately following. Particularly significant changes were brought about in the application of the First Amendment. In 1950 the Supreme Court had an excellent opportunity to again apply the "clear and present danger" rule. But in a case[46] that involved non-protection under the Labor Management Relations Act for unions which failed to file with the N. L. R. B. non-communist affidavits, the Court said that the difficulty of application suggested the fact that the rule was impossible to apply unless the situation was similar to the one which gave birth to the rule thirty-one years previously. The Court, by resorting to the commerce clause stated that this statute was not aimed at suppressing expression, but rather was designed to prevent a combination of communist beliefs with a position of great power over the economy of the country. Thus, by basing the decision on the power to regulate commerce,[47] and

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[37]United States v. Paramount Pictures, 334 U.S. 131 (1948).

[38]Largent v. Texas, 318 U.S. 418 (1943).

[39]Near v. Minnesota, *supra* note 24.

[40]Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S 230 (1915).

[41]*Ibid.*

[42]Are they any more a business than a newspaper?

[43]CHAFFEE, *op. cit, supra* note 10, at 540.

[44]Gitlow v. United States, 268 U.S. 652 (1925). Here the First Amendment freedoms were protected from state infringement.

[45]Kupferman and O'Brien, *Motion Picture Censorship-The Memphis Blues,* 36 CORNELL L.Q. 273 (1951); Note, 60 YALE L.J. 596 (1951).

[46]American Communications Ass'n. v. Douds, 339 U.S. 382 (1950).

[47]If a union officer may affect commerce, might not any person's thoughts, ideas, or actions also affect commerce indirectly; and couldn't any future case also be decided under the broad provisions of the commerce clause? But what of the preferred posi-

eliminating from consideration the First Amendment freedoms, the Court completely side stepped a further interpretation of the "clear and present danger" doctrine.

In retrospect, one should not have been surprised the following year when the Court, faced with the duty of passing on the validity of the Smith Act,[48] did not use the old "clear and present danger" test in applying the First Amendment. The Smith Act was, without a doubt, a positive limit on speech. Therefore, its validity depends on its ability to meet the existing test on speech; and the test, as of that time, was the "clear and present danger" rule.[49] The substantive evil in this case[50] was the violent overthrow of the Government. At the time there were approximately 54,000 Communists in this country.[51] One wonders how much success the 54,000 would have had.[52] Instead of applying the old test, however, the Court commended the use of the test set up by Judge Learned Hand in the lower court and expressly adopted it as its own. "In each case courts must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[53] Although the new test as announced in this case supplants the older "clear and present danger" rule,[54] it is submitted that the new test does not make for any more clarification or understanding.

The next year one of the most recent pronouncements came about with regard to a paper that was held to be contrary to the existing law of the state of Illinois.[55] The defendant circulated a paper which exposed the negro race to derision in violation of a statute expressly forbidding a publication so attacking "citizens of any race, color, creed, or religion." The defendant invoked the First Amendment, but the Supreme Court said that it would not interfere with the enforcement of state laws like the one involved here if the state law is not "purposeless" and is not "unrelated to the peace and well-being of the State." The Court said that the limits on free speech had not been finally decided in this country and that the appellate court would uphold the local laws unless they were unreasonable or unrelated to an evil. This case, considered with the *Douds* case[56] and the *Dennis* case[57] seems to indicate that there is no concrete or definite rule to be applied and that state

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tion of the First Amendment? See Black, dissenting in American Communications Ass'n. v. Douds, *supra* note 47. There is force in his statement that the court assures us that the restriction " ' touches only a relative handful of persons, leaving the great majority of persons . . . completely free from restraint.' But not the least of the virtues of the First Amendment is its protection of each member of the smallest and most unorthodox minority."

[48]54 STAT. 671 (1940), 18 U.S.C. § 2385 (1946). This statute makes it a crime to advocate, teach, or organize, or help to organize for the purpose of overthrow of this government by force and violence.

[49]Remember that the Douds case, *supra* note 47, had avoided the First Amendment rules.

[50]Dennis v. United States, 341 U.S. 494 (1951).

[51]1951 THE AMERICANA YEAR BOOK 702.

[52]The only argument for the majority is that the Communist Party is not only a political party, but is also a conspiracy.

[53]Dennis v. United States, 341 U.S. 494, 510 (1951).

[54]Corwin, "Bowing Out 'Clear and Present Danger,'" 27 NOTRE DAME LAW. 325 (1952).

[55]Beauharnais v. Illinois, 343 U.S. 250 (1952).

[56]American Communications Ass'n. v. Douds, *supra* note 47.

[57]Dennis v. United States, *supra* note 51.

decisions will be given unequivocal support if the Federal courts can find any sort of a relationship between a state restriction and an evil existing in the state or if the state restriction seems "reasonable."[58] There seems to have been no change, however, in the Court's attitude toward freedom from prior censorship. It still seems to be entitled to a greater degree of protection than is freedom from punishment.[59]

The next case involving motion pictures was decided in 1952. It was *Burstyn v. Wilson*[60] and the state statute involved gave a censor the duty to ban pictures that were "sacreligious."[61] The Court realized that this was the first time since the *Mutual*[62] decision in 1915 that it had been faced *directly* with the question of whether motion pictures were within the ambit of the First Amendment. The Court said the fact that moving pictures were operated for profit and that they had a great influence on children should make no difference as far as the First Amendment is concerned. Motion pictures were declared henceforth within the protection of the First Amendment and language to the contrary in the *Mutual* case was specifically overruled. However, it was concluded by the Court that the state, by which a censor could ban films as being sacrilegious, was not sufficiently definite to justify censorship. The Court said that under this statute, the "censor is set adrift upon a boundless sea and amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor." Although stating that it was not called on to decide whether or not a state might censor films under a clearly drawn statute the implication seems very clear indeed that the Court meant such to be the case.[63] Consequently, the two phases of the problem (protection of freedoms of expression under the First Amendment and prior censorship of motion pictures) were reunited for the first time since their brief association in the *Paramount* case.[64]

Then, in 1953, there were rendered in two state courts, decisions which upheld the power of the censor to refuse to grant a license to show motion pictures. The first of them was decided in Ohio in April;[65]

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[58]See Black, dissenting in Dennis v. United States, 341 U.S. 494 (1952). There he says that free speech is guaranteed by the Constitution and not by this court's idea of "reasonableness."

[59]Kunz v. New York, 340 U.S. 290 (1951) and Niemotko v. Maryland, 340 U.S. 268 (1951).

[60]343 U.S. 495 (1952); 24 Miss. L.J. 258 (1953).

[61]After stating that in order to show any picture there must be a license therefore, the statute continues ". . . and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, the censors shall issue a license therefor."

[62]Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230 (1915).

[63]Notes, 32 B.U.L. Rev. 451 (1952), 19 Brooklyn L. Rev. 125 (1952), and 27 N.Y.U.L.Q. Rev. 699 (1952). In the latter it is said that any form of restraint "must conform to those basic principles which have been established and applied to other forms of expression protected by the First and Fourteenth Amendments."

[64]United States v. Paramount Pictures, 334 U.S. 131 (1948).

[65]Superior Films, Inc. v. Department of Education of State of Ohio, Division of Film Censorship; Commercial Pictures Corporation v. Regents of University of State of New York, 74 S.Ct. 286 (1954), *reversing* Superior Films, Inc. v. Department of Education of State of Ohio, Division of Film Censorship, 159 Ohio St. 315, 112 N.E.2d 311 (1953). Note, 25 Miss. L.J. 273 (1954).

the Ohio court saying that under the *Burstyn* case, *supra,* freedom of expression did not mean that every film of every kind had to be licensed at all times and places. The picture involved,[66] however, did not pass the test of the statute,[67] because the censor said it was "harmful."

The other case[68] decided in May in New York was also refused a license under a statute providing that no picture should be licensed if it is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." The censor here said that the French movie "La Ronde" was "immoral" and "would tend to corrupt morals."[69] Both pictures had been considered by the respective censor to be indecent, immoral, and generally harmful. The theater interests, however, contended that prior restraint represented a violation of the guarantees of the First Amendment, and that the licenses were refused under statutes which were vague and indefinite, just as the statute in *Burstyn v. Wilson.*[70] In the light of the most recent decisions of the Supreme Court regarding the First Amendment,[71] it was arguable that the Court would probably not reverse the state courts unless the statutes were vague and indefinite. When the two cases were heard together, in January 1954, the Supreme Court gave a Per Curiam opinion, reversing both state courts. Prior censorship of motion pictures on the grounds of immorality is a violation of the freedom of speech and press guarantees of the First Amendment.

There are several very interesting aspects of this decision. It seems to close the door on all censorship of all movies. The conclusion might be that the Supreme Court now thinks that the movies' own production code[72] along with the fact-finding organization of the industry itself[73]

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[66]The picture, "M," was banned because it involved cold blooded murders; a schizophrenic killer was treated with sympathy; methods of abducting children from the streets were shown; and an underworld boss was shown as being more efficient than the police.

[67]The statute provided that "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board."

[68]Superior Films, Inc. v. Department of Education of State of Ohio, Division of Film Censorship; Commercial Pictures Corporation v. Regents of University of State of New York, 74 S.Ct. 286 (1954), *reversing* Commercial Pictures Corporation v. Regents of University of State of New York, 113 N.E.2d 502 (1953).

[69]The film from beginning to end deals with promiscuity, adultery, fornication and seduction.

[70]Burstyn v. Wilson *supra* note 61.

[71]In American Communications Ass'n. v. Douds, 339 U.S. 382 (1950), a free speech case was decided under the commerce clause, and it was said that this curtailment touches only a relative few; in Dennis v. United States, 341 U.S. 494 (1951) it was said that "In each case courts must ask whether the gravity of the 'evil', discounted by its probability, justices such invasion of free speech as is necessary to avoid the danger," and in Beauharnais v. Illinois, 343 U.S. 250 (1952), it was said that state statute, prohibiting publications that attacked "citizens of any race, color, creed, or religion" would not be set aside as violating the First Amendment unless the state statute was "purposeless" and "unrelated to the peace and well-being of the State;" and in Burstyn v. Wilson, 345 U.S. 495 (1952) it was strongly implied that if a state's basis for restricting the free showing of motion pictures was not too indefinite, then the state restriction would be valid.

[72]*The Motion Picture Producers and Distributors of America, Inc.—The Production Code* in 1949-50 INTERNATIONAL MOTION PICTURE ALMANAC 647 (1949).

[73]Note, 60 YALE L.J. 697 (1951). The high cost of making a picture today compels production of pictures assured of appeal.

and the actual organized boycotts by certain groups[74] are sufficient restrictions.

It is also an inevitable conclusion that prior censorship or restraint based on "immoralty" is forbidden under the First Amendment. The oft-cited case of *Near v. Minnesota*[75] had said that "obscenity" was a valid basis for prior restraint. Immorality and obscenity are not far apart in meaning. Therefore, it would be entirely consistent with this most recent declaration of the Court to say that part of *Near v. Minnesota, supra,* is overruled.

After an examination of this case and its background the student is still at a loss for the court's present interpretation of the First Amendment as a whole. The "clear and present danger" test can no longer be relied on. No test has been laid down by the Court in the latest cases. The Per Curiam reversal of the Ohio and New York decisions[76] fails to indicate whether the Court only narrows prior restrictions so as to make the restrictions allowed by the state courts there invalid; or whether it completely pre-empts the field and now will declare any modicum of prior restraint unconstitutional. The concurring opinions of Mr. Justice Black and Mr. Justice Douglas in this last case would seem to give weight to the latter conclusion,[77] but the question remains for the Court to finally answer in some future decision.

John T. Keeton

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[74]*Ibid.*

[75]283 U.S. 697 (1931).

[76]See note 68 *supra.*

[77]Reasonably, the Court might adopt the concurring opinion in Superior Films, Inc. v. Department of Education of State of Ohio; Commercial Pictures Corporation v. Regents of University of State of New York, 74 S.Ct. 286 (1954), regarding the present status of the First Amendment. "The First and the Fourteenth Amendments say that Congress shall make 'no law' which abridges freedom of speech or of the press. In order to sanction a system of censorship I would have to say that 'no law' is qualified to mean 'some' laws. I cannot take that step."

THE "TRILEMMA" OF THE CONGRESSIONAL COMMITTEE WITNESS

It has been stated that the line between investigation and persecution is thin. The validity of this observation can be demonstrated by analyzing the dilemma of the Congressional investigating committee witness. When one appears before an investigating committee, he is automatically suspended over three possible grounds for prosecution. No matter what he says or does not say he may land on one, and possibly more, of the three. The grounds are (1) prosecution for a substantive crime that may be revealed from his testimony, (2) prosecution for contempt, and (3) prosecution for perjury.

Prosecution for the Substantive Crime

It is provided by statute that no testimony given before a Congressional committee may be used in evidence against the declarant in any court, except in a prosecution for perjury committed in giving such testimony.[1] It has been made clear in the recent case of *Adams v. State of Maryland*[2] that the immunity granted in the federal statutes is applicable also to state courts; the conclusion was based on the supremacy clause of the Constitution.[3] This protection, however, does not extend beyond the testimony actually given;[4] other evidence obtained from a source revealed in the testimony or official papers or records[5] produced by him may be used against the witness in a subsequent prosecution. Hence, the testimony may not be used against the witness directly but may be so used indirectly.

The witness must answer a question that would incriminate him under a state law, provided it would not incriminate him under any federal law.[6] The testimony itself, according to present statutes, would not be admissible in the state courts, but only the evidence derived therefrom. If there were no immunity statute, the incriminating testimony could be used against the witness in a state court, even though the witness has the state constitutional privilege not to take the stand.[7]

Consequently, if the immunity granted is broad enough to include all crimes derived from the testimony that may result in possible or future prosecutions in any court, the witness must testify freely, but without fear of any prosecution.[8] If the immunity applies only to federal courts or to testimony given and not to all future and possible prosecutions that may be derived there-from, as does the present law, the witness, if he would avoid prosecution for a substantive crime, must refuse to answer any questions relative to the matter. In so refusing, he subjects himself to the most potent, possible prosecution.

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[1] 62 STAT 833 (1948), 18 U.S.C. Sec. 3486 (1950).
[2] 74 S.Ct. 442 (1954).
[3] U.S. CONST. Art. IV, Sec. 6.
[4] *Supra* note 2; Counselman v. Hitchcock, 142 U.S. 547 (1892).
[5] *Supra* note 1.
[6] Feldman v. United States, 322 U.S. 487 (1944); U.S. v. Murdock, 284 U.S. 141 (1931). However, these cases are based upon an erroneous interpretation of Brown v. Walker, 161 U.S. 591 (1896).
[7] Feldman v. United States, *supra* note 6.
[8] Brown v. Walker, *supra* note 6.

Prosecution for Contempt

The most probable prosecution one appearing before a Congressional investigating committee must meet is that for contempt. If he would positively avoid this prosecution, the witness must answer every question posed and provide all material requested. If the witness followed this course, however, he would have to relinquish some of his constitutional guarantees, *i. e.* his privilege against giving self-incriminating evidence. There are those who would never give this privilege to witnesses and who convincingly present that this guarantee is an anachronism and only now operates to obstruct justice. Whether this view is subscribed to or not, the provision against giving self-incriminating testimoney is presently a constitutional guarantee and to deny to even the most heinous criminal this privilege is to render impotent the principle of equal protection of the laws to all. If those witnesses who are guilty of committing some crime are forced to answer all queries in order to prevent prosecution for contempt, prosecution for the substantive crime necessarily follows.

There is no way a witness may refuse to answer a question of a Congressional committee without running the probable risk of prosecution. One may refuse to answer the interrogation of the investigators primarily upon the grounds of (1) relevancy and (2) self-incrimination. The former is a defense after refusal to testify; the latter is a privilege to be used affirmatively. Only the latter may be waived.[9]

Before a witness may be punished for refusing to answer a question, it must be shown that such question was relevant to the purpose of the investigation.[10] In *Bowers v. United States*[11] the defendant had refused to answer questions directed by a Senate committee investigating organized crime in interstate commerce and was prosecuted under a statute[12] for such refusal. The witness declined to answer interrogatories about his business activity in Chicago around 1927, about where he had obtained $5,000 to pay for a ten per cent interest in a restaurant, and whether or not he knew a person who owned four dog tracks. Bowers did not assign irrelevancy as his reason for refusal. The United States Court of Appeals for the District of Columbia held that since the prosecution had failed to show how these questions were pertinent to the purpose of the investigating committee, the conviction of the district court would be reversed. The court added that if the questions had been demonstrated to be links with which the committee could join Bowers to interstate crime, their pertinency could have been established. The court declared that a " 'do-you-know-a-certain-person' question, *without more,* can never be said to be pertinent for the purposes of a criminal prosecution." (emphasis supplied) From the viewpoint of the witness, the case offers little comfort, for *"without more"* is quite nebulous. The court indicated that even a slight linkage of the questions to the com-

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[9]Bowers v. United States, 202 F. 2d 447 (D.C. Cir. 1953).

[10]Sinclair v. United States, 279 U.S. 263 (1929); Bowers v. United States, *supra* note 9.

[11]*Supra* note 9.

[12]Rev. Stat. Sec. 102 (1884), 2 U.S.C. Sec. 192 (1926). "Every person who having been summoned as a witness . . . to give testimony . . . upon any matter under inquiry before . . . any committee of either House of Congress . . . refuses to answer any question pertinent to the question under inquiry shall be deemed guilty of a misdeamnor . . . "

mittee's purpose would have been sufficient. It is submitted that Bowers was successful in his refusal only because the prosecuting authorities thought the pertinency of the questions too obvious for demonstration or, as an oversight, they forgot the pertinency requirement.

This belief is strengthened by the decision of *United States v. Orman*[13] where the Senate committee investigating crime in interstate commerce asked the witness the name of one from whom he had borrowed $25,000 in 1950 and directed him to produce a book containing the records of his business transactions for the year 1951. The court held that if the answer "possibly" could have been connected to the committee's purpose the refusal to answer was contemptuous. The court then declared that it was immaterial that the answer would not have been pertinent so long as there was the *possibility* that it would be at the time of the asking. The contents of the requested book in fact were not pertinent to the purpose of the investigation; nevertheless, the court declared that the refusal to produce the book was contemptuous. Another statement of the court that " . . . once he admitted substantial income from gambling, the more detailed inquiries . . . became pertinent" establishes that each preceding answer may give pertinency to the next apparently unrelated question. This statement implies that once an irrelevant question is answered further questioning as to the details of the answer become pertinent and, consequently, must be answered.

The distinguishing factor of the *Orman* case from the *Bowers* case may have been time, for in the latter case the witness was questioned about his activities during 1927 and in the former the questioning was about the witness' activities during 1950. The court stated in the *Bowers* case that the witness may well have refused to answer earlier questions about his teen-age life. If this is the distinction, the cases offer little opportunity for predictability. The point in time at which the pertinent question is separated from the non-pertinent can only be determined by the circumstances of each case. The witness, therefore, cannot afford to rely upon lack of pertinency for refusal to answer, for there are few questions for which pertinency can not be shown and the witness can never know how the investigating committee intends to link the most seemingly irrelevant question to its purpose; and the decision on pertinency made under the pressure of the committee hearing has little likelihood of considering all the possible methods of connection. The subsequent decision of *United States v. Lattimore*,[14] where an indictment for perjury was challenged for not alleging pertinency, illustrates that one cannot know whether a question was relevant until the Government has introduced all of its evidence at the trial. The court in that case would not disallow the indictment even though there was no specific allegation of pertinency.

While it is perilous to base a refusal to respond on grounds of relevancy, it is equally hazardous to rely upon the constitutional privilege of not giving self-incriminating evidence.

When he wishes to invoke his constitutional privilege of not giving self-incriminating testimony, the witness must make a series of treacherous and complex choices; the wrong decision, even though made with

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13 207 F.2d 148 (3rd Cir. 1953).
14 112 F.Supp. 507 (D.C. D.C. 1953).

caution and good faith, will result in contempt prosecution. The witness must first be certain to invoke his privilege against self-incrimination, for one cannot passively refuse to testify without stating his grounds for refusal.[15] It has been stated that the prohibition against the giving of self-incriminating evidence is a "fighting clause, the benefits of which can be retained only by sustained combat."[16] The witness' only weapons in this "sustained combat" are his words. They must be selected carefully. If he answers an incriminating question with "Fifth Amendment"[17] or "I think it is my duty to endeavor to protect the rights guaranteed under the Constitution, primarily the First Amendment, supplemented by the Fifth,"[18] the witness has failed to give the formula for invoking the privilege against self-incrimination. One can adopt the phrases of another to invoke the privilege, but whether or not the other has invoked it must be determined by the trial court and is a question of intention as manifested by the words used. In *Quinn v. United States*[19] the witness was asked if he would accept the statement of another, Fitzpatrick, made on the previous day, as an expression of his views. Quinn indicated approval. On appeal the court ruled that Quinn could invoke the privilege against self-incrimination by referring to and adopting the statement of another and that Quinn had adopted the statement of Fitzpatrick as his own. The court then remanded the case, holding that the lower court should determine whether Fitzpatrick himself had properly invoked the privilege, even though it had been held previously in another case that Fitzpatrick had claimed his privilege.[20] Thus, it is possible that one may be held to have invoked his privilege, but another who adopts his identical words may be held to have failed in invoking the privilege. Furthermore the privilege cannot be invoked for a witness by his attorney.[21]

Another choice, which is certainly reasonable and not unusual, which the witness must make is whether or not the proposed question is incriminating. If a question does not appear to be incriminating upon its face, the witness must decide whether or not a court in subsequent proceedings will agree with him that the question was incriminating. The witness has the burden of showing that he had reasonable grounds to believe an answer to the demanded question would be incriminating,[22] but it has been held that the claim of privilege should be sustained unless it is " . . . perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such a tendency to incriminate."[23] It is important

[15]Rogers v. United States, 340 U.S. 367 (1951); United States v. Monia, 317 U.S. 424 (1943); United States v. Murdock, *supra* note 6.

[16]United States v. Johnson, 76 F.Supp. 538 (D.C. Pa. 1948).

[17]Quinn v. United States, 203 F.2d 20 (D.C. Cir. 1952). The court pointed out that the Fifth Amendment contained more than one clause.

[18]Emspak v. United States, 203 F.2d 54 (D.C. Cir. 1952).

[19]S*upra* note 17.

[20]United States v. Fitzpatrick, 96 F.Supp. 491 (D.C. D.C. 1951).

[21]Haines v. United States, 188 F.2d 546 (9th Cir. 1951), *cert. denied,* 342 U.S. 888 (1951); Zeigler v. United States, 174 F.2d 439 (9th Cir. 1949), *cert. denied,* 338 U.S. 822 (1949); United States v. Johnson, *supra* note 16.

[22]Counselman v. Hitchcock, 142 U.S. 547 (1892); United States v. Rosen, 174 F.2d 187 (2nd Cir. 1949), *cert. denied,* 338 U.S. 851 (1949); United States v. Emspak, *supra* note 18.

[23]Hoffman v. United States, 341 U.S. 479 (1951); United States v. Costello, 198 F.2d 200 (2nd Cir. 1952); United States v. Doto, 110 F.Supp. 518 (D.C. N.Y. 1953), reversed on other grounds, 205 F.2d 416 (2nd Cir. 1953).

to note that the witness is really not placed in a difficult position, for he does not have to show that the grounds for believing the question was incriminating existed in fact, but must only show that there was reasonable grounds for *him* to so believe.[24] And newspaper reports[25] of impending investigations or testimony and facts of a legislative committee report[26] are sufficient grounds for arousing such apprehension.

While one may use his privilege against questions which, though not incriminating themselves, are in a chain of questions that may incriminate,[27] the witness may not invoke the privilege on the grounds that an associate or friend may be incriminated by his answer.[28] A witness in *Rogers v. United States*[29] had stated to the grand jury that she had given certain membership lists and dues records of the Communist Party to another. When asked to whom she had given the records, the witness would not reply and gave as her reason, "I don't feel that I should subject a person or persons to the same thing that I'm going through." Mr. Chief Justice Vinson explicitly pointed out in the opinion for the Supreme Court that this was an untenable ground for refusal.

Some questions, such as those pertaining to associations with communists or communistic organizations, are practically incriminating per se,[30] but the majority of the questions asked are not likely to appear as such on the face. Consequently, even though the cases indicate that the courts will not differ with him unless his claim is fanciful or arbitrary, the witness must not abandon caution when asserting his privilege but must be certain that valid reasons exist for believing that an answer would incriminate.

The most difficult problem confronting the witness is the method by which he can prevent waiver of his privilege. That a witness may waive his privilege against self-incrimination is certain.[31] That a witness does not waive his privilege by answering questions that are not incriminating seems also to be unchallenged. A witness in the criminal case of *United States v. Toner*[32] answered a number of questions on direct examination but declined to answer queries of the cross-examiner on the grounds of self-incrimination. The defendant maintained on appeal that the witness waived his privilege by testifying on direct examination. In denying this contention, the court stated that the interrogatories of the direct examination were not incriminating and that since he could not have refused to reply, the witness did not waive his privilege. The majority of the cases hold, however with strong dissents, that an answer to

[24]Kasinowitz v. United States, 181 F.2d 632 (9th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951).

[25]*Supra* note 24; United States v. Weisman, 111 F.2d 260 (2nd Cir. 1940). The latter case stated, " . . . while the irresponsible gossip of a newspaper is a weak reed, there is always the possibility that it may for once be right."

[26]*Supra* note 24.

[27]Hoffman v. United States, *supra* note 23; United States v. Weisman, *supra* note 25.

[28]Rogers v. United States, *supra* note 15; United States v. Greenberg, 187 F.2d 35 (3rd Cir. 1951).

[29]*Supra* note 15.

[30]Blau v. United States, 340 U.S. 159 (1951); Kasinowitz v. United States, *supra* note 24; Alexander v. United States, 181 F.2d 480 (9th Cir. 1950); United States v. Emspak, *supra* note 18.

[31]Rogers v. United States, *supra* note 15; Smith v. United States, 337 U.S. 137 (1949); United States v. Toner, 173 F.2d 140 (3rd Cir. 1949).

[32]United States v. Toner, *supra* note 31.

a question which incriminates waives the privilege with respect to the details and particulars of the fact or transaction disclosed.[33] In the above mentioned *Rogers* case the witness testified to a grand jury that she had been the Treasurer of the Communist Party of Denver, that there previously had been in her possession certain records of the party, and that she no longer had the records in her possession, having turned them over to another. The witness' refusal to tell to whom the records had been given was held to have been contempt by the United States Supreme Court, which declared that the previous testimony had operated as a waiver of her privilege against self-incrimination. Thus, the witness must be positive that each question asked him is incriminating and, if so, not answer. The burden of the witness in this respect is appreciated upon consideration of the many and diverse laws that regulate our society; one may fully answer questions about a transaction without knowing that the transaction was violative of a law. Of course, the witness may refuse to answer any and all questions for fear that he may thereby waive his privilege; but prosecution for contempt would be certain to follow. After answering some questions, the witness before a committee cannot be certain that he has not waived his privilege until he is subsequently tried in court. Hence, he must decide when he can invoke his privilege. If he invokes it too soon, contempt; if he waits too late, waiver.

In addition to the two primary grounds for refusing to answer queries of the Congressional committees, there is another ground recognized by an United States District Court and accepted by an United States Court of Appeals. The District Court for the District of Columbia held in *United States v. Kleinman*[34] that an improper atmosphere at the committee hearing may be a sufficient reason for refusing to testify. Kleinman was being investigated by the Senate committee investigating organized crime in interstate commerce. In close proximity to the witness were television and newsreel cameras, "news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc." After pointing out that the refusal of the witness to testify must be viewed in the context of all of the conditions, the court declared, "The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous." The court discharged the defendant. While not applying the ruling of the *Kleinman* case, the Court of Appeals for the Third Circuit implied its acceptance by distinguishing the case of *United States v. Orman*[35] from it. However, the Court of Appeals for the Second Circuit apparently does not recognize this ground for refusal. In *United States v. Moran*[36] the witness, similar to Kleinman, faced "microphones, television cameras and photographers," but the court held that the hearing was not so lacking in decorum as to render it an incompetent tribunal. It is important to note that this decision

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[33]Rogers v. United States, *supra* note 15; Brown v. Walker, 161 U.S. 591 (1896); United States v. St. Pierre, 132 F.2d 837 (2nd Cir. 1942). Justices Black, Frankfurter, and Douglas dissent strongly from this doctrine in the first case, maintaining that the privilege cannot be waived unless it is *knowlingly* waived. United States v. Weisman, *supra* note 25, lends support to the dissenting justices.

[34]107 F.Supp. 407 (D.C. D.C. 1952).

[35]207 F.2d 148 (3rd Cir. 1953).

[36]194 F.2d 623 (2nd Cir. 1952).

was rendered prior to the *Kleinman* and *Orman* cases; hence the court may not have been willing to establish this ground for refusal, but, since the foundation has been laid, may allow it subsequently. This new ground for refusal raises the thus far unanswered question of how can an appellate court determine the amount of distraction at a committee hearing since only the record appears before it. It will be interesting to discover the answer when and if this ground is further utilized by witnesses.

From the two types of prosecution thus far presented, it may be concluded that as a result of testifying before investigating committees, only those who have committed some substantive crime need fear prosecution. Even though this may satisfy believers that constitutional rights and justice are only for the innocent, the conclusion is dispelled by the next grounds for prosecution.

Prosecution for Perjury

The witness who testifies freely to every question, even though they may be embarrassing and involve past and forgotten indiscretions, and who has committed no crime, has to fear only prosecution for prejury. The witness can easily escape this prosecution if his memory is photographic; if it is not, escape from this prosecution may not be so simple.

The leading case in the field of prejury as a result of testifying before investigative committees is *United States v. Lattimore.*[37] The defendant, Owen Lattimore, was indicted on seven counts of prejury allegedly committed before the Senate Internal Security Subcommittee. Count One, which charged that Lattimore had committed perjury when he stated that he had never been a sympathizer or any other kind of promoter of communism or communist interest, was held to be violative of the Sixth Amendment in that the accusation was too indefinite to inform the accused of the violation charged. It is apparent that no one could defend such a charge, for had he even encouraged the second front in Europe in World War II, he would have promoted communist interest. The court added that the count was also in conflict with the First Amendment, stating that it restricted freedom of belief and expression which was unaccompanied by overt act. The court, indicating approval of the dissenters, distinguished the *Douds* case[38] from the present by showing that there were overt acts in the former case. Counts Three and Four charged that Lattimore had lied when he stated that he did not *know* certain people were communists. The lower court dismissed these charges as also being too indefinite and an infringement of the First Amendment, adding that it could never be determined what the defendant *knew*; however, on appeal the Court of Appeals for the District of Columbia reversed the lower court and held that courts and juries passed upon *knowledge*, belief, and intent every day and was not too indefinite or vague in meaning for prosecution.[39] Count Seven was declared defective because of an inconsistency. The case illustrated that prosecution for perjury may fail on two grounds—failure to meet the "definiteness" requirement of the Sixth Amendment and infringement of the First Amendment.

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[37]112 F.Supp. 507 (D.C. D.C. 1953).
[38]American Communications Association v. Douds, 339 U.S. 382 (1950).
[39]United States v. Lattimore, 23 L.W. 2021 (D.C. Cir. 1954).

Only one of the other counts in the case is relevant here. Count Five, which was allowed, indicates the predicament of the witness. The witness had stated that he had attended a luncheon with a Mr. Carter and Mr. Oumansky. The following colloquy then occurred:

"Mr. Morris: What year was that?

"Mr. Lattimore: That was 1941.

"Mr. Morris: What month in 1941?

"Mr. Lattimore: It was just before I went out, so it must have been early July 1941.

"Mr. Morris: That was therefore after the Hitler invasion of the Soviet?

"Mr. Lattimore: Yes."[40]

Count Five charged that Lattimore lied in that the luncheon was held while the Hitler-Stalin pact was still in effect and before the Hitler invasion of the Soviet Union on June 22, 1941. It is proffered that anyone questioned in 1952 about a luncheon engagement in 1951 may have erred in giving the correct date of such meeting and especially would this be so if the witness did not consider the question to be of material importance in the first place. Even though the court allowed the defendant a bill of particulars and left the question of materiality to subsequent trial, it still is apparent that when he is questioned concerning a matter about which his memory is hazy, the witness must choose to do one of the following: (1) answer definitely and invite possible prosecution for perjury; (2) refuse to answer and face contempt proceedings; (3) give an indefinite and unsatisfactory answer. It is evident that the only safe course to follow in each such case is the latter; the result of which would probably be a direction by the chairman to answer specifically.

Conclusion

The predicament of the committee witness demonstrates the power of the committee. That a committee can use this power to imprison any person that appears before it is within the realm of possibility. Even more devastating is the notoriety and suspicion a committee, without any basis, may attach to the witness' name by branding him with such loaded words as pink, left-wing, unAmerican, or liberal. The resulting social isolation and economic deprivation is more severe than confinement in prison. It is not believed, however, that this tremendous power is an argument for the abolishment of Congressional investigating committees. The Congressional committee's role in fulfilling the need for enlightened legislators and an informed public is evident. To restrict the committee's power is to limit its capacity in this role.

The solution to the predicament of the witness is to lodge the control of the committees in the hands of capable legislators who recognize their power and appreciate the plight of the witness. In short, men who would investigate and not persecute. When the power becomes lodged in the latter, the vigilance of the judiciary must be doubled to prevent abuse and injustice. And the force of the electorate must remove the persecutors.

Maurice Dantin

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[40] *Supra* note 37.

The Construction of Limitations Over Upon Death Without Issue

The validity of limitations over upon death without issue has been the cause of a great deal of litigation ever since the development of the rule against perpetuities. The English judges adopted a rule of construction favoring the indefinite failure of issue interpretation of such limitations.[1] This indefinite failure of issue construction seems so illogical to the modern lawyer that at first it is difficult to comprehend; but when we remember that at the time of its adoption such institutions as primogeniture and fee tail estates were in common use and favored by the courts, it is not surprising that the preference for the indefinite construction was adopted.

The definite and indefinite failure of issue constructions might best be explained by example. Let us consider how the typical limitation, "to *A* and his heirs, but if he die without issue, to *B* and his heirs", would be interpreted under each construction. Here obviously *A* is the first taker, and the limitation over is in favor of *B*. Under their indefinite failure of issue construction, the courts hold that the limitation over not only could take effect at the death of *A* without issue, but also it could take effect at any time that the last descendant of *A* died. Under the definite failure of issue construction, the limitation over could not take effect at the death of *A* without issue. Thus under the definite failure of issue construction, if *A* died with issue, the limitation over would never take effect, while under the indefinite failure of issue construction, it could still take effect at any time that all of the descendants of *A* died. Under the definite construction, if *A* died with a son who died one year later, the limitation would not take effect, since *A* had issue living at his death; however, under the indefinite failure of issue construction, the limitation over to *B* would take effect at the death of *A's* son, since at that time all of *A's* direct descendants have died. Likewise, under the indefinite failure of issue construction, the limitation would take effect at the death of the son's children if they did not leave descendants.[2]

The common law preference for the indefinite failure of issue construction carried over into personal property,[3] as well as real property. However, the results reached were often different, due to the fact that when dealing with real property, the courts could find that the limitation over granted a vested remainder after a fee tail to which the rule against perpetuities did not apply.[4] In applying the indefinite failure of issue construction to personal property, this reasoning could not be followed, since there was no fee fail in personalty, and thus the gift over would be a violation of the rule against perpetuities.[5]

The common law preference for the indefinite failure of issue was merely a rule of construction, and in some cases the language of the in-

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[1]Bauckerk v. Dormer, 2 Atk. 308, 26 Eng. Rep. 588 (1742); Wyld v. Lewis, 1 Atk. 432, 26 Eng. Rep. 276 (1738); Green v. Rod, Fitz. 68, 94 Eng. Rep. 656 (1732). For a collection of cases see 2 Simes, Law of Future Interest, § 335 n. 4 (136).

[2]Other explanations of definite and indefinite failure of issue may be found at 57 Am. Jur., Wills § 1238; John Chipman Gray, The Rule Against Perpetuities, § 211 (4th ed. 1941); William E. Burby, Burby on Real Property, § 300 (2nd ed. 1954).

[3]Candy v. Campbell, 2 Cl. & F. 421, 6 Eng. Rep. 1213 (1831); Everest v. Gell, 1 Ves. Jun. 286, 30 Eng. Rep. 346 (1791).

[4]Simmons v. Simmons, 8 Sim. 22, 59 Eng. Rep. 9 (1836); Machell v. Weeding, 8 Sim. 4, 59 Eng. Rep. 2 (1836).

[5]Note 3 *supra.*

strument being construed was strong enough to overcome this preference. For instance, in the case of *Pells v. Brown*,[6] where the limitation was, "to *A* and his heirs, and if *A* died without issue, living *B*, his brother, to *B* and his heirs", the language was held to be sufficiently strong to uphold the definite failure of issue construction. Only four years later, however, in an analagous situation,[7] similar language was held not to overcome the preference for the indefinite failure of issue construction. The results were somewhat different when personal property was involed, since the language did not have to be as strong to overcome the presumption.[8] In some cases involving both personal and real property, the same language has been construed as meaning an indefinite failure with respect to the real property, and a definite failure as to the personal property.[9]

The common law preference for an indefinite failure of issue construction had a strong impact upon the early American decisions. Most states followed the common law and adopted the indefinite failure of issue construction, except where the clear intention of the testator or grantor is violated.[10] However, this presumption is usually more easily overcome than at common law,[11] and in a few states the common law was not followed.[12]

In more than one-half of the states, this question has now been settled in favor of the definite failure of issue construction by legislation.[13] The statutes in these states are based generally upon those passed in Virginia[14] in 1817 and New York[15] in 1830. Mississippi became the second state to adopt such a statute[16] in 1822 by passing an exact copy of the Virginia act. England also has a statute[17] modeled upon the one passed by Virginia. The major difference between the New York and the Virginia statutes, and those based upon them, is that the Virginia statute does not exclude the possibility of an indefinite failure of issue construction, but merely states that the language of the instrument must clearly support such a construction; while the New York statute, and those based upon it, seem to be mandatory in the definite failure of issue construction. Yet it has been suggested that even under a statute which seems to be mandatory the possibility of the indefinite failure of issue construction is not completely removed.[18]

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[6]Cro. Jac. 590, 79 Eng. Rep. 504 (1620).

[7]Chadock v. Crowley, Cro. Jac. 695, 79 Eng. Rep. 604 (1624).

[8]As pointed out at 2 SIMES, *op. cit. supra* note 1, § 337 the language did not have to be so clear to support a definite construction when personal property was involved as greater violence was done since there was no vested remainder after a fee tail in personality.

[9]Forth v. Chapman, 1 P. Wms. 663, 24 Eng. Rep. 559 (1720).

[10]69 C. J., WILLIS § 1331.

[11]SIMES, *op.cit. supra* note 1, § 340.

[12]St. John v. Dann, 66 Conn. 401, 24 A. 110 (1895); Niles v. Gray, 12 Ohio St. 320 (1861) (Which stated that the rule was regretted by the country that adopted it as shown by its abolition statute that it contravenes the fundamental principles of our government and social policy, and further that it ignores the clear intent of the testator.)

[13]Restatement, Property § 266 (Supp. 1948). According to this list of statutes, thirty states had adopted a definite failure of issue statute prior to January 1, 1947.

[14]VA. CODE § 5151 (1942).

[15]N. Y. REAL PROP. LAW § 48.

[16]MISS. CODE § 837 (1942).

[17]1 VICT. c. 26, § 29 (1837).

[18]Warren, *Gifts over on Death Witnout Issue*, 39 YALE L. J. 332, at page 340 (1930).

In considering the statute favoring the definite failure of issue, it should be remembered that it in no way affects the period prescribed by the rule against perpetuities. The statute merely gives the court a rule of construction to apply in appropriate cases which causes the interest given in the limitation over to vest at an earlier time if it is to vest at all. This did not change the common law rule that an interest which vests after an indefinite failure of issue is beyond the period permitted by the rule against perpetuities and that an interest which vests after a definite failure of issue is within the period allowed.[19]

The statute also raises a presumption that the testator did not intend the limitation over to take effect if the first taker dies with children or issue, as the case may be, *en ventre sa mere*.[20] There are two possibilities in which this provision might become important. First, if the limitation were on the death of the first taker without children, he might leave children *en ventre sa mere,* or second, if the limitation were to take effect upon the death of the first taker without issue, he might leave children or grandchildren *en ventre sa mere;* and in either case, the limitation over would be defeated.[21]

As might be suspected, the Mississippi court has had occasion since the passage of our act in 1822 to use the indefinite failure of issue construction, even in view of the clear statutory preference for the definite failure of issue construction. This construction was adopted in the case of *Powell v. Brandon*[22] where there was a gift over "on failure of lineal descendants."[23] From the clear language of the will the court here was certainly justified in using the indefinite failure construction.

A very interesting and rather ingenious argument which is made to the court under certain circumstances has been that the limitation over should not take effect, even when the issue predeceases the first taker. This argument is that the limitation is intended to take effect only if the first taker die without ever having had issue. Such an argument was rejected by the Mississippi court in the case of *Busby v. Rhodes*.[24] In that case the issue had predeceased the first taker and the court held that the limitation over took effect. Basing its conclusion solely upon Section 837 of the Mississippi Code of 1942, the court recently reached the same conclusion in the case of *Hays v. Cole*.[25] Another situation in which such a construction might be urged is where the first taker, after having children, wishes to alienate. The English courts have refused to adopt such a construction even though the language would seem to support it.[26] American courts are generally not so strict but have construed such phrases as "die having no heirs born to her",[27]

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[19]Hampton v. Rather, 30 Miss. 193, 205 (1855); Jordan v. Roach, 32 Miss. 481, 617 (1856); 2 TIFFANY, REAL PROPERTY, § 411 (3rd ed. 1939).

[20]MISS. CODE § 837 (1942). This section states that in order to defeat the limitation over the first taker must have children or issue "living at the time of his death, or born to him ten months thereafter."

[21]Middlesex Banking Co. v. Field, 84 Miss. 646, 658, 37 So. 139, 144 (1904).

[22]24 Miss. 343 (1852).

[23]Powell v. Brandon, 24 Miss. 343, 360 (1852).

[24]58 Miss. 237 (1880).

[25]73 So. 2d 258 (Miss. 1954).

[26]Crooke v. De Vandes, 9 Ves. Jun. 197, 32 Eng. Rep. 577 (1803); Wyld v. Lewis, 1 Atk. 432, 26 Eng. Rep. 276 (1738).

[27]Essick v. Caple, 131 Ind. 207, 30 N. E. 900 (1892).

"without his having children",[28] and "if she should have living issue",[29] to mean that the limitation was to take effect only upon death without ever having had issue. An instrument containing strong language indicating that the limitation was not to take effect unless the testator died without ever having had issue seems never to have been presented to the Mississippi court, but probably the other American jurisdictions holding that such a construction is permissible would be followed.

The case of *Jordan v. Roach*[30] presented a unique situation with regard to limitations over upon death without issue. In that case property was given to the testator's daughter on the condition that "should she die without issue, or if her child or children surviving her, should die before arriving at the age of twenty-one," the property was to revert to the testator's other children. First, the court decided that the words "child or children" as used in the will were synonomous with "issue", since they felt that it was the desire of the testator to benefit all lineal descendants. The court then held that the limitation over to the other children could not take effect because it violated the rule against perpetuties. The reasoning was that the children of the first taker might die under twenty-one leaving children, and these in turn could do the same so that it was impossible to determine how long it might take either to extinguish the issue of the first taker or have one of them reach the age of twenty-one. The court in this case made the statement that it is not unusual for a person to die under twenty-one leaving issue.[30] It is an interesting conjecture to consider at what age the possibility of dying with issue would defeat such a limitation. Strictly following the common law, probably no age would be young enough to remove this possibility if the similarity between the possibility of issue for extremely old persons is to be followed.[31] This case would have an important lesson for the careful draftsman wishing to have a limitation effective either upon death without issue, or upon death of the issue under a certain age. Such a limitation under this decision could be effected in two ways. One way would be to make it clear that only the *children* and not the *issue* of the first taker are included. Also the limitation could effectively be made to take effect upon either the death of the first taker without issue, or upon the death of the issue of the first taker alive at the death of the first taker under twenty-one and without issue. Under these two examples the court could not consider the possibility of an indefinite period before the issue reached twenty-one, since under both only those alive at the death of the first taker could be considered. Both of these, however, would depend upon the court's interpreting the period of the rule against perpetuities to include the twenty-one year period after the lives in being under our statute.[32]

In the case of *White v. Inman*,[33] the Mississippi court recently con-

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[28]Walker v. Trollinger, 192 N. C. 744, 135 S. E. 871 (1926).

[29]Clough v. Clough, 64 N. H. 509, 15 A. 127 (1888).

[30]32 Miss. 481 (1856).

[31]Tyler v. Fidelity & Columbia Tr. Co., 158 Ky. 280, 164 S. W. 939 (1914); Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 S. W. 629 (1923); Jee v. Audley, 1 Cox 324 (1787).

[32]Miss. Code § 838 (1942).

[33]212 Miss. 237, 54 So. 2d 375 (1951). A note and interesting discussion of this case can be found at 30 A. L. R. 2d 380.

sidered for the first time whether the first taker may be considered to be in the class of those who take the gift over. There the testator made a bequest to his widow and daughter, but provided that if both should die without issue, the fee was to go to the testator's lawful heirs. After holding that the lawful heirs should be determined as of the testator's death, the court held that the daughter should not be excluded from this class by reason of her prior estate and her devisee took the interest to which she was entitled. The argument made to the court was that the testator satiated his desire to benefit the daughter by making the gift of the prior estate and that he therefore did not intend her to share in the class of those who were to take under the limitation over.

One argument that has been made to our court rather frequently, but usually with little success, is that the death without issue must occur before the death of the testator if the limitation is to be effective. Such a construction is known as the substitutional construction. The Mississippi court has consistently adopted this construction when the limitation is to take effect upon the mere death of the legatee.[34] However, a different construction has been adopted when the limitation is to take effect upon death of the legatee without issue.[35] This construction is based chiefly upon Section 837 of the Mississippi Code of 1942, which requires that such a limitation upon death without issue is to take effect at the death of the first taker. In the case of *Hanie v. Grissom*,[36] the court considers other factors which tend to show that the testator did not intend the substitutional construction. Among these were the age of the testator, a provision forbidding sale of the property without consent of a majority of the legatees, and a request that the property be controlled as the testator had controlled it. It is submitted that the relation of these latter two factors, if any, is remote. *Darrow v. Moore*[37] is another case in which the court refused to adopt the substitutional construction. This case is interesting since the court was not able to use the definite failure of issue statute as the point was controlled by Alabama law. In this case the daughter was only nine and at the time that the will was executed, the testator was on his death bed. These circumstances, the court said, were repugnant to the idea that the testator contemplated the daughter's death without issue before his own. Another factor was brought out in the case of *Allen v. Howard*,[38] in which the problem was controlled by Tennessee law, which seems to favor the substitutional construction in such cases. The factor which seems to have overcome the Tennessee preference for the substitutional construction was that the resdue was left to the same person to whom the limitation over was given. Thus it was reasoned that if the substitutional construction were adopted, the limitation over would be mere surplus language as the remainder would go by the residuary clause in case of death before the testator and without issue.

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[34]*In re* Raworth's Estate, 211 Miss. 780, 52 So. 2d 661 (1951); Biddy v. Broome, 116 Miss. 70, 76 So. 835 (1917); Sims v. Conger, 39 Miss. 231 (1860).

[35]Crump v. Phelps, 207 Miss. 682, 43 So. 2d 105 (1949); Allen v. Howard, 199 Miss. 839, 25 So.2d 325 (1946); Hanie v. Grissom, 178 Miss. 108, 172 So. 500 (1937); Darrow v. Moore, 163 Miss. 705, 135 So. 484 (1931) *aff'd in part rev'd in part*, 163 Miss. 754, 142 So. 447 (1932); Scottish American Mortgage Co. v. Bunckley, 81 Miss. 599, 33 So. 416 (1902).

[36]178 Miss. 108, 172 So. 500 (1937).

[37]163 Miss. 705, 135 So. 484 (1931) *aff'd in part rev'd in part*, 163 Miss. 754, 142 So. 477 (1932).

[38]199 Miss. 839, 25 So. 2d 325 (1946).

The indefinite failure of issue and substantial construction are rarely considered together in other jurisdictions. However, it is interesting to note that in the other jurisdictions which do consider the two together, one state having the same statute as ours reached the conslusion that it made the substitutional construction mandatory,[39] while in two others the result was the same as that reached in Mississippi.[40]

When the first taker is given a mere life estate and the disposition in case of death with children is not specified, the question arises whether or not the children of the first taker should be given a remainder by implication. The first case in which such a remainder seems to have been implied in this state is *Ball v. Phelan*.[41] There the limitation had the additional clause which would effectuate the gift over upon the death of the children of the first taker unmarried or under age. The court said that the implication here was so strong that it excluded the idea that a contrary intention existed and that no other rational purpose could be assigned to the testator. In two later cases[42] in which the first taker had a mere life estate and no remainder was specified, the court held that no remainder by implication was created. Justice Griffith's dissent in one of these cases was rather sharp, as he clearly thought that the *Ball* case, *supra,* had permanently established that a remainder would be implied in such a situation. This seems to be a reasonable interpretation of the *Ball* case, *supra,* and yet the majority in these later cases reached the opposite result without overruling the *Ball* case, *supra.* Just what additional factors must be present before a remainder will be implied is not certain, and the situation remains as Justice Griffith states, ". . . cast upon an uncertain sea without dependable chart or compass."[43] It is submitted that the additional limitation over upon death of the children may have influenced the court in the earlier decision, as such a limitation shows beyond doubt that the testator had the children of the first taker in mind.[44]

The Mississippi court under certain circumstances was held that upon the death of the last person capable of taking under the limitation over, the first taker has a fee. This construction is only adopted when the limitation itself contains words which show that the testator intended that the limitation only take effect if the ultimate beneficiary is alive. Such words as "surviving"[45] and "that are living"[46] modifying the ultimate beneficiary have been interpreted as requiring the survival of the ultimate beneficiary. *Armstrong v. Thomas*[47] presents a good example of the requirement of survivorship in the ultimate beneficiary. There the testator granted real estate to her four daughters, but provided that if any of them should die without issue, her share would go over to "their surviving sister." The first sister to die died without

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39*In re* Johnson, 23 R. I. 111, 49 A. 695 (1901).

40Harvey v. Bell, 118 Ky. 512, 81 S. W. 671 (1904); Kirkman v. Smith, 175 N. C. 579, 96 S. E. 51 (1918).

41194 Miss. 295, 49 So. 956 (1909).

42Bell v. Dukes, 158 Miss. 563, 577, 130 So. 734 (1934); Jones v. Carney, 122 Miss. 244, 84 So. 186 (1920).

43Bell v. Dukes, 158 Miss, 563, 577, 130 So. 734 (1934).

44Hale v. Neilson, 112 Miss. 291. 72 So. 1011 (1916).

45Armstrong v. Thomas, 112 Miss, 272, 72 So. 1006 (1916); Halsey v. Gee, 79 Miss. 193, 30 So. 604 (1901).

46Hanie v. Grissom, 178 Miss. 108, 172 So. 500 (1937).

47112 Miss. 272, 72 So. 1006 (1916).

issue, the next two with issue, and the last died without issue. The Court held that the interest of the last sister to die had become indefeasible by the death of all her sisters prior to her. It is submitted that possibly the testator's intent would have been more exactly expressed by adding the clause that the children of any deceased sister should take the share to which the parent would have been entitled.

The counsel in the case of *Caldwell v. Willis*[48] made the argument that the definite failure of issue statute was applicable to validate a gift after a life estate to the child or children of the life tenant then living and the descendants of such child or children and their heirs forever. The argument was that the statute applied so as to make only the descendants alive at the death of the life tenant capable of taking. The court, however, in rejecting the argument, stated that the statute only applied to limitations upon death without issue and in no way affected limitations upon death with issue.

In conclusion it might be stated that the Mississippi statute[49] giving preference to the definite failure of issue construction has not only been effective in settling the definite failure of issue construction has not only been effective in settling the definite failure of issue construction, but has also been employed by our court in deciding several questions arising out of limitations to take effect upon death without issue. Thus, although the question of definite or indefinite failure of issue has almost ceased to be a litigated question in this state, the statute continues to be used to influence, and in some instances control the court in the decision of related matters, such as whether death without ever having had issue, or death before the testator, was intended. It is submitted that even though this extended use of the statute may not have been contemplated by the legislature, nevertheless, such use is clearly within the spirit of the act. Chancellor Kent stated shortly after the passage of a similar act in his state, " . . . it is impossible not to feel some relief . . . at the final settlement, in any way, of this litigious question by legislative enactment."[50] Thus it appears that the settlement of these closely related questions is certainly within the spirit of the statute.

Certain of the other problems discussed, such as whether the first taker should be considered in the class of those who take under the limitation over, and whether a remainder should be implied to the children of the first taker when the first taker is given a mere life estate, are not directly affected by the statute preferring the definite failure of issue. However, it seems that these problems are so closely related to the limitation over that when the problem arises again, only cases involving a limitation over will be considered as controlling.

As all the problems arising from limitations over upon death without issue are questions of construction, they could be eliminated by a clear expression on the part of the grantor or testator. However, as Professor Simes states, even the most experienced draftsman avoids the use of the words "if he die without issue" due to their diverse and obscure meaning.[51]

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48 57 Miss. 555 (1880).
49 Miss. Code § 837 (1942).
50 4 Kent Commentaries 319 (14th ed. 1896).
51 2 Simes, Law of Future Interest, § 334 (1936).

When is a Corporation Doing Business in Mississippi

The answer to the question of whether or not a corporation is doing business in a state other than the one in which it is incorporated may have far-reaching consequences for the corporation. If a foreign corporation is found to be doing business in a state, without having met the statutory requirements, it may be precluded from bringing a suit in the courts of that state. It may be subject to the personal jurisdiction of the state courts, even though it has not qualified to do business in the state nor appointed an agent to receive service or process. Further, a corporation which is found to be doing business in a state foreign to its incorporation may be subject to certain forms of taxation by the foreign state.[1]

The foreign corporation which chooses to extend its operations to Mississippi must consider all three of these possibilities. By statute, a foreign corporation which does business in Mississippi must appoint a resident agent to receive service of process, or be barred from bringing suit in the courts of this state.[2] It must file a copy of its charter or articles of incorporation with the Secretary of State, or be subject to a fine of not less than $100 00.[3] Any foreign corporation which is "found doing business" in Mississippi is subject to suit in this state to the same extent as are domestic corporations.[4] Another statute provides that any non-resident corporation "who shall do any business or perform any character or work or service in this state," by doing of such acts, impliedly appoints the Secretary of the State as its agent for the service of process.[5] Foreign corporations which are found to be doing business in Mississippi are also subject to certain state taxes.[6]

Although the consequences of "doing business" are obvious, after a reading of the statutes, the corporate acts necessary to constitute "doing business" are not so easily ascertainable. The question of what constitutes "doing business" by a foreign corporation is largely one of fact, as the Mississippi Supreme Court has said, and each case must be decided on

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[1]Although the question of whether or not a corporation is doing business in a particular state will usually arise in one of the three ways stated, a similar question may be posed in Mississippi when it is sought to determine the proper venue for a suit involving a corporation. See American Surety Co. v. Holly Springs, 77 Miss. 428, 27 So. 605 (1899); Dean v. Brannon, 139 Miss. 312, 104 So. 173 (1925); Vicksburg, S. & P. Ry. v. Forsheimer, 113 Miss. 531, 74 So. 418 (1917); Tchula Commercial Company v. Jackson, 147 Miss. 296, 111 So. 874 (1927); Hercules Powder Co. v. Tyrone, 155 Miss. 75, 124 So. 74, (1929); Sandford v. Dixie Construction Co., 175 Miss. 626, 128 So. 887 (1930); Natchez Coca Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931); McLeod Lumber Co. v. Manassa Timber Co., 180 Miss. 552, 178 So. 83 (1938); Forman v. Mississippi Pubilsher's Corp., 195 Miss. 99, 14 So. 2d 334 (1943); Southern Wholesalers, Inc. v. Stennis Drg Co., 214 Miss. 461, 59 So. 2d 78 (1952); 18 FLETCHER, CYC. CORP. § 8651 (1933).

The federal courts are often faced with the same problem in administering the federal anti-trust act. See People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79 (1918); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359 (1927); Freeman v. Bee Machine Co., Inc., 319 U. S. 448 (1943); U. S. v. Scophony Corp., 333 U. S. 795 (1948); 10 FLETCHER, CYC. CORP. § 5041 (1933).

[2]MISS. CODE § 5319 (1942).

[3]MISS. CODE § 5343 (1942).

[4]MISS. CODE § 5345 (1942).

[5]MISS. CODE § 1437 (1942).

[6]See *Taxation Cases* section of this article.

the basis of its own peculiar factual situation.[7] The question is further complicated by virtue of the fact that the same factual situation may be treated differently, depending upon the type of statute involved. Acts which constitute doing business for purposes of the process statutes[8] may not be sufficient to meet the requirements of the penalty statutes,[9] and may be treated in a manner entirely different from both for tax purposes.[10]

There are, however, a few well established principles which are helpful in deciding whether certain acts do, or do not, amount to a doing of business in this state. The dissenting opinion in Lee v. Memphis Publishing Co.[11] embodies a statement of these broad general rules as follows:

1. "No rule can be announced applicable to all cases."
2. "The object to which the question is directed will influence the conclusion."
3. Whether the transactions of the corporation within the state are in furtherance of its charter, functions and purpose, and whether they are of a continuing character are factors of marked influence on the determination of the question.
4. Mere solicitation of orders in a state does not ordinarly constiute "doing business," viewed in the light of the facts and issues involved, where such a transaction is part of the regular business of the corporation and indicates a purpose to carry on a substantial portion of its dealings in the state.
5. "Much weight is attached to the maintenance of an agency or office in the state."[12]

Cases Arising Under Penalty Statutes[13]

The so-called penalty statutes[14] have been the largest source of litigation on the question of what constitutes doing business in Mississippi, more cases having been decided under them than under the process and taxation statutes combined. While most of the cases arose under the present statutes, several were decided under earlier statutes and are worthy of consideration, if only to show how the question was handled before the enactment of the present laws.

Thus, where a foreign insurance corporation issued in New York an insurance policy covering property in Mississippi, it was held to be doing business in this state so as to preclude its bringing an action in the state courts to recover premiums, as a penalty for failure to comply with

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[7]Wiley Electric Co. v. Electric Storage Battery Co., 167 Miss. 842, 147 So. 733 (1933); Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So. 2d 615 (1951).

[8]Miss. Code §§ 1437, 5345 (1942).

[9]Miss. Code §§ 5319, 5343 (1942).

[10]General Electric Contracts Corp. v. Stone, 193 Miss. 301, 7 So. 2d 806 (1942); Davis-Wood Lumber Co. v. Ladner, *supra* note 7.

[11]195 Miss. 264, 14 So. 2d 351 (1943).

[12]*Ibid.*

[13]For a more general treatment of this topic see 17 Fletcher, Cyc. Corp. § 8464-8502 (1933).

[14]Miss. Code §§ 5319, 5343 (1942).

the statutory requirements[15] for doing business in Mississippi by insurance companies.[16] A different result was reached in a later case involving substantially the same factual situation, and the earlier decision was criticized by the Court as unduly harsh.[17]

A telegraph corporation which was engaged in the interstate transmission of messages, as well as intrastate business, was held, by virtue of the transmission and delivery of telegraph messages in intrastate commerce, to be doing business in Mississippi, and thus subject to the statutory penalty[18] for failure to comply with the terms of another statute[19] requiring a foreign corporation to do certain acts before engaging in business in the state.[20]

Although the statutory provisions involved in these earlier cases were somewhat different from those in force at the present time, the considerations involved in deciding the question of whether or not a foreign corporation is doing business in Mississippi are substantially the same.

The starting point for any consideration of the decisions is the rule that the statutes imposing penalties for failure to qualify to do business apply only to intrastate commerce, and where the business done by the corporation is wholly interstate in nature, it is not within the prohibitions of the statute.[21] Thus, where the corporation maintains an office in the state through which it solicits business, makes sales and enters into contracts, it will be found to be doing business.[22] Where, however, the corporate acts consist merely of solicitation of business by an agent, with no contracts or sales being made within the state, no business is done within the meaning of the statutes.[23] If the solicitation is accompanied by other activities in the state, such as advance advertising and establishment of a temporary headquarters by the corporation's agent,[24] and approval and acceptance of contracts followed by the beginning of construction of a manufacturing plant,[25] or the servicing of an article sold in interstate commerce by a local mechanic,[26] the corporation is "doing business" in the state and is subject to the penalties provided for failure to qualify.

It is not every act other than, or in addition to, the mere solicitation of interstate business which constitutes a doing of business within the

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15Miss. Code § 1073 (1880).

16Cowan v. London Assurance Corp., 73 Miss. 321, 19 So. 298 (1895).

17Swing v. Brister, 87 Miss. 516, 40 So. 146 (1905).

18Miss. Code § 4329 (1892).

19Miss. Code § 4328 (1892).

20Western Union Telegraph Co. v. Mississippi State Railroad Commission, 74 Miss. 80, 21 So. 15 (1896).

21Smith v. J. P. Seeburg Co., 192 Miss. 563, 6 So. 2d 541 (1942).

22Western Union Telegraph Co. v. Mississippi State Railroad Commission, *supra* 20; Quartette Music Co. v. Haygood, 108 Miss. 755, 67 So. 211 (1914); Citizens' Bank of Hattiesburg v. Grigsby, 170 Miss. 655, 155 So. 684 (1934); Newell Contracting Co. v. State Highway Commission, 195 Miss. 395, 15 So. 2d 700 (1944).

23Union Cotton Oil Co. v. Patterson, 116 Miss. 802, 77 So. 795 (1917); Savell v. Schultz, Baujan & Co., 213 Miss. 427, 57 So. 2d 151 (1952).

24Mark & Bensdorf, Inc. v. First Joint Stock Land Bank, 178 Miss. 345, 172 So. 297 (1937).

25Peterman Construction and Supply Co., v. Blumenfeld, 156 Miss. 55, 125 So. 548 (1930).

26Case v. Mills Novelty Co., 187 Miss. 673, 193 So. 625 (1940).

state. Purely local acts which are merely incidental to the interstate business of the corporation do not constitute "doing business." If contracts are entered into in another state involving land or other property located in Mississippi, these transactions will not be converted into intrastate business so as to make the unqualified corporation subject to statutory penalties merely because the corporation sends agents into the state to appraise and photograph the property,[27] forcloses mortgages and leases the property involved until it can be disposed of,[28] sends agents into the state to solicit applications for loans[29] and to inspect and appraise property offered as collateral,[30] takes possession of automobiles under the terms of instalment contracts and leaves them with a local dealer to be sold,[31] sends agents into the state to see that the corporation's interest in collateral is properly cared for,[32] or even where the corporation, in order to protect itself from loss, forecloses its mortgage on equipment used in operating a gravel pit, purchases the equipment at the sale, leases a gravel pit in the state and then sub-leases the gravel pit and equipment to another party in order to recover the amount of its loan.[33]

The fact that foreign corporation is authorized to do business in the state is sufficient to raise the inference that it is doing business as authorized.[34] So, where a foreign corporation was authorized to do business in Mississippi, but had failed to appoint a resident agent to receive service of process, and executed numerous contracts in the state, as well as closely controlling the operations of its local storeroom operators, it was "doing business" locally and could not bring suit in the courts of the state.[35] It is probable that the same result would have been reached even though the corporation had not qualified to do business in Mississippi.

A foreign newspaper corporation which has no office or place of business in this state is not doing business here even though it sends agents into the state for the purpose of establishing agencies, arranging with news-stands for the sale of papers, and doing various other acts in connection with the sale of newspapers.[36] In this case, the Mississippi dealers who sold the newspapers purchased them from the corporation and received no refunds for unsold copies. The Court found that the dealers sold the papers on their own accounts, and the corporation was therefore not doing business in Mississippi.

Where a foreign corporation makes contracts with its local dealers outside the state, allocates territories to these dealers, allows them to return unsold goods and requires periodic reports from them, it it not doing business in this state,[37] and this is true even though the corpora-

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[27]Shemper v. Latter & Blum, 214 Miss. 113, 58 So. 2d 359 (1952).
[28]North American Mortgage Co. v. Hudson, 176 Miss. 265, 168 So. 79 (1936).
[29]C. I. T. Corp. v. Stuart, 185 Miss 140, 187 So. 204 (1939).
[30]Morrison v. Guaranty Mortgage and Trust Co., 191 Miss. 207, 199 So. 110 (1941).
[31]Yellow Manufacturing Acceptance Corp. v. American Oil Co., 191 Miss. 757, 2 So. 2d 834 (1941).
[32]Refrigeration Discount Corp. v. Turley, 189 Miss. 880, 198 So. 731 (1940).
[33]Harleston v. West Louisiana Bank, 129 Miss. 111, 91 So. 423 (1922).
[34]Wiley Electric Co. v. Electric Storage Battery Co., 167 Miss. 842, 147 So. 733 (1933).
[35]*Ibid.*
[36]Item Co., Ltd. v. Shipp, 140 Miss. 435, 193 So. 913 (1940).
[37]Watson v. J. R. Watkins Co., 188 Miss. 435, 193 So. 913 (1940).

tion may have "contact men" in Mississippi who advise local dealers and recommend other persons for appointment as local dealers.[38]

If a foreign corporation merely makes loans in another state, taking mortgages on Mississippi property as collateral, without sending agents into this state for any purpose whatsoever, it is not doing business here.[39]

Although a foreign corporation may have done business in Mississippi without meeting the statutory requirements, if it ceases that business and attempts to liquidate its holdings here, the sale of its property in the course of such a liquidation does not constitute "doing business," since it is not part of the business of the corporation, but is for the purpose of winding it up.[40] However, where the corporation does business in Mississippi without qualifying to do so, subsequent qualification by the corporation will not relate back to the previous acts of business, and contracts growing out of such business cannot be enforced in the Mississippi courts.[41] Where acts performed after qualification do not represent new and independent undertakings, but are performed under the terms of a contract entered into while the corporation was illegally doing business in the state, they cannot serve as a basis for recovery.[42]

Even though a contract may have been entered into by a corporation while it was illegally doing business in Mississippi, if the corporation transfers its interest to a third party who is not under the corporation's statutory disability, the third party may enforce the contract in the courts of this state. The penalty statute[43] was intended merely to deny access to the state courts to foreign corporations illegally doing business here, and was not intended to apply to third parties.[44]

In a recent decision, the Supreme Court of the United States held that the penalty provided by § 5319 includes the Corporation's right to sue in the federal courts in Mississippi, as well as in the state courts.[45]

Cases Arising Under Process Statutes[46]

The Supreme Court of Mississippi has said that the interpretation of the phrase "doing business" should be less strict where a process statute is involved than where a penalty statute governs the decision.[47] Although the Court has stated this as a principle of law to be followed, the distinction is not so readily apparent in the decisions involving the two types of statutes. The Mississippi decisions construing the process statutes[48] are not nearly so numerous as are those involving the penalty statutes. It is therefore much more difficult to determine the trend of decisions on this topic.

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[38]J. R. Watkins v. Flynt, 72 So. 2d 195 (Miss. 1954).

[39]Dodds v. Pyramid Securities Co., 165 Miss. 269, 147 So. 328 (1933).

[40]Long Beach Canning Co. v. Clark, 141 Miss. 177, 106 So. 646 (1926).

[41]Peterman Construction and Supply Co. v. Blumenfeld, *supra* note 25; Newell Contracting Co. v. State Highway Commission, *supra* note 22.

[42]Newell Contracting Co. v. State Highway Commission, *supra* note 22.

[43]Miss. Code § 5319 (1942).

[44]Citizens' Bank of Hattiesburg v. Grigsby, *supra* note 22.

[45]Interstate Realty Co. v. Woods, 337 U. S. 535 (1944).

[46]For a more general treatment of this topic see 18 Fletcher, Cyc. Corp. §§ 8709-8734 (1933).

[47]Davis-Wood Lumber Co. v. Ladner, *supra* note 7.

[48]Miss. Code §§ 1437, 5345 (1942).

The leading pertinent decision of the Mississippi Court is *Davis-Wood Lumber Co. v. Ladner,* in which the distinction between the considerations involved in the process and penalty statutes is drawn. That distinction is put upon the basis that a state should be permitted to control business within its borders to the extent of making a corporation doing such business answerable in its courts for any cause of action arising out of that business, and that such a requirement does not work such a hardship on the corporation as does the revocation of its right to sue in the courts of the state.

The *Davis* case sets forth the following definition of "doing business":

> "Doing business is doing a series of similar acts for the purpose of thereby accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts."

Thus, it seems that the prime requisite for doing business under the process statutes is continuity of action.[51]

In the *Davis* case, the foreign corporation engaged in a continuous and substantial series of transactions in Mississippi over a period of two years. During that time, under a contract for the manufacture of lumber, which was wholly executed and performed in this state, the corporation sent its trucks into Mississippi to pick up lumber several times each week. It also employed a resident of Mississippi to run its operations in the state, and employed and paid the salaries of workmen at the lumber mill. All of the above acts were within the scope and purpose of the usual activities of the corporation. The corporation was held to be doing business in this state within the meaning of the process statutes.

In other cases under the process statutes, a foreign corporation has been found to be doing business in Mississippi where it had an agent in the state who solicited pecans to be shipped on commission to the corporation's office in Chicago and sometimes made outright purchases of pecans with his own funds, for which he was later reimbursed by the corporation,[52] and an unincorporated association was doing business in the state where one of its system of lodges was located in Mississippi, and it had an agent here for the purpose of collecting dues from members.[53]

Corporations have been found not to be doing business in this state under the process statutes where they sent a soliciting agent into the state, who merely took orders for merchandise, said orders being sent to the corporation in another state for acceptance.[54]

An anomalous case is *Lee v. Memphis Publishing Co.*,[55] in which a foreign newspaper corporation which maintained an office in the state,

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[49]*Supra* note 7.
[50]Davis-Wood Lumber Co. v. Ladner, *supra* note 7.
[51]Mississippi Wood Preserving Co. v. Rothschild, 201 F. 2d 233 (5th Cir. 1953).
[52]Gridley, Maxin & Co. v. Turner, 179 Miss. 890, 176 So. 733, 177 So. 362 (1937).
[53]Brotherhood of Railroad Trainmen v. Agnew, 170 Miss. 604, 155 So. 205 (1934).
[54]Saxony Mills v. Wagner, 94 Miss. 233, 47 So. 899 (1908); Knower v. Baldwin, 195 Miss. 166, 15 So. 2d 47 (1943).
[55]195 Miss. 264, 14 So. 2d 351 (1943).

had distributors of its newspapers in many communities of the state, required its distributors to execute a bond to insure performance of their contracts, and had a very large portion of its circulation in Mississippi, was held not to be doing business in this state. The activities in which the corporation engaged would seem to be sufficient to constitute a doing of business even under the penalty statutes, and this decision cannot be explained by any of the general rules which have been held to govern the question.[56] The result of the *Lee* case is entirely out of line with the other decisions of the Mississippi Court, and such a result would seem to be indefensible. It has recently been strongly criticized by one of the Justices of the Mississippi Supreme Court.[57]

The Supreme Court of the United States has stated the requirements of the due process clause[58] which must be met in any application of acts such as the Mississippi process statutes[59] as follows:

> "To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."[60]

Thus, it would seem that the Mississippi Supreme Court has not gone as far in applying the process statutes as the Constitution permits.[61]

Taxation Cases[62]

The tax liability of a foreign corporation which does business in Mississippi is, like the application of the penalty statutes, sustainable only to the extent that it does not place an undue burden upon interstate commerce.[63] It must also meet the requirements of due process.[64]

In an early case in the federal court, it was held that a foreign corporation was doing business in Mississippi so as to be subject to taxation on the money and property employed therein where it maintained offices in the state through which it sold and collected for sewing machines and from which weekly reports were made to the corporation's out-of-state office, but was found not to be doing such business during a period when it merely had traveling salesmen in the state who sold sewing machines, both for cash and on credit, and transported all money and contracts incident to such sales out of the state.[65] The Mississippi Su-

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56See first general rule of Lee v. Memphis Publishing Co., *supra* note 11.

57Hall, J. in J. R. Watkins Co. v. Flynt, 72 So. 2d 195 (Miss. 1954) (especially concurring opinion).

58U. S. CONST. AMEND. ART. XIV, § 1.

59MISS. CODE §§ 1437, 5345 (1942).

60International Shoe Co. v. Washington, 326 U. S. 310 (1948).

61See cases cited in this subdivision, notes 47-60, *supra*.

62For a more general treatment of this topic see 18 FLETCHER, CYC. CORP. § 8804 (1933).

63Memphis Steam Laundry v. Stone, 342 U. S. 389 (1952).

64International Shoe Co. v. Washington, *supra* note 60.

65Singer Manufacturing Co. v. Adams, 165 Fed. 877 (5th Cir. 1909).

preme Court later rendered a decision in which the result was the same where the foreign corporation had, from time to time, an agent in the state who collected payment on interstate loans, the Court holding that the act of collecting outstanding loans did not, alone, constitute the doing of a money lending business in Mississippi so as to subject the corporation to the privilege tax levied on such businesses.[66]

Where, however, a corporation which engaged in buying notes and conditional sales contracts from automobile dealers in Mississippi and sent its agents into the state to collect payments and ascertain the existence and condition of its collateral also maintained offices in Jackson and Memphis, the Court found that it was doing business here, even as to the Mississippi transactions handled through the Memphis office and was subject to the privilege tax imposed upon the doing of such business.[67] In defining the acts necessary to subject a foreign corporation to taxation in this state it was said:

> "All that is necessary is that something be done or take place within the taxing state that is incident to or substantially connected with the prosecution of business."[68]

It was further held that the tax did not constitute an undue burden on interstate commerce because local corporations were subject to the same tax.[69]

A foreign pipeline corporation which had no office in Mississippi and transacted no interstate business in this state, with the exception of selling gas wholesale to one customer, but which had 135 miles of pipeline, two compressor stations and such employees as were necessary to maintain the pipeline and its appurtenances within the state was held by the Supreme Court of the United States to be subject to a state franchise tax where the state Supreme Court[70] construed the tax as compensation for the protection of the Corporation's local activities and not a tax upon the privilege of doing an interstate business.[71] The Court upheld the tax because the activities taxed were carried on solely within the state of Mississippi and were thus not subject to tax in any other state, even though the corporation had previously paid ad valorem taxes on the property used in such activities. The additional tax was said to be in effect merely a raising of the ad valorem rates.

A foreign laundry company engaged in picking up laundry in Mississippi, processing it in Tennessee and returning it to customers in Mississippi was held not to be subject to a privilege tax imposed only on laundries not licensed in Mississippi, since such a tax was an undue burden on interstate commerce, constituting a tax on the privilege of doing interstate business.[72] A privilege tax sought to be levied upon a foreign pipeline corporation engaged wholly in interstate commerce was declared unconstitutional on the same ground.[73]

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[66]Gulley v. C. I. T. Corp., 168 Miss. 268, 150 So. 367 (1933).

[67]Miss. Laws 1940, c. 110.

[68]Stone v. General Electric Contract Purchase Corp., 193 Miss. 301, 7 So. 2d 806 (1942).

[69]*Ibid.*

[70]Memphis Natural Gas Co. v. Stone, 201 Miss. 670, 29 So. 2d 268 (1947).

[71]Memphis Natural Gas Co. v. Stone, 335 U. S. 80 (1948).

[72]Memphis Steam Laundry v. Stone, *supra* note 63.

[73]Coleman v. Trunkline Gas Co., 63 So. 2d 73 (Miss. 1953), *cert. denied*, 74 S. Ct. 41 (1953). This decision is noted in 24 Miss. L. J. 329 (1953).

Conclusion

It is apparent that no particular act or group of acts can be said to constitute doing business in Mississippi for all purposes or in all cases. While this state of affairs will probably always prevail to a certain extent because of the fact that the question is not one which lends itself to the formulation of concrete rules, there are some possibilities for simplification of the problem.

The first of these is the use of a single standard for the determination of what constitutes doing business, rather than the triple standard —different requirements depending upon whether penalty, process or taxation statutes are involved—now in effect. There seems to be no real public policy basis for the present distinction, and so long as the standard which is set up meets the Constitutional requirements of reasonableness and justice,[74] foreign corporations subjected to it would have no valid ground for complaint.

Secondly, the Mississippi Court should go as far as the Constitution permits in finding that a foreign corporation is doing business in this state. The *International Shoe* case sets up requirements which are considerably more liberal in the direction of finding that a corporation is doing business within a particular state than are those of the Mississippi Court. All that is necessary under the *International Shoe* doctrine is that the standards applied be reasonable and fair in their operation.[75] Even the "mere solicitation" rule has been held to be abrogated by the *International Shoe* case.[76]

With the rapidly expanding industrialization of this state and the consequent increase in commercial activity, the "doing business" problem is likely to arise with regularity in the future. It is submitted that Mississippi's commercial "growing pains" may be dealt with somewhat more easily if the suggested simplifications are effectuated.[77]

J. David Orlansky

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[74]International Shoe Co. v. Washington, *supra* note 60.

[75]*Ibid.*

[76]Bomze v. Nardis Sportswear, Inc., 165 F. 2d 33 (2d Cir. 1948).

[77]The development of the doctrine set out in International Shoe Co. v. Washington is treated exhaustively in Note, *The Growth of the* International Shoe *Doctrine,* 16 U. of Chi. L. Rev. 523 (1949).

THE SEGREGATION DECISION

On May 17, 1954 the Supreme Court of the United States declared, in its decision in the *Segregation Cases*,[1] that segregation in the state supported public schools was unconstitutional. The decision in the *Segregation Cases* is one of the most historic ever handed down by that judicial body. Although the decision in the *Segregation Cases* directly affected only four states[2] and the District of Columbia[3] it indirectly affects the public school systems of some seventeen other states[4].

The right to establish, maintain and control the public schools had long been a right belonging exclusively to the states. In the case of *Cumming v. Richmond County Board of Education*,[5] Mr. Justice Harlan, speaking for the Court said:

> " . . . the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of the Federal authority with the management of such school cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

It is evident, as a result of the *Segregation Cases*, that segregation by reason of one's race is an "unmistakable disregard of rights secured by the supreme law of the land."

Mr. Chief Justice Warren in delivering the opinion of the Court said:

> "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."[6]

After discussing the place of modern education in our "democratic society", Mr. Chief Justice Warren concluded:

> " . . . whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[7]
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

The "modern authority" relied upon by the Court in support of its decision are not case authority but consist entirely of articles and books in the field of sociology and psychology.[8]

The acceptance of the decision in the *Segregation Cases* as the law of the land has not been by universal approval. The reaction to the decision from the states

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[1]74 S. Ct. 686 (U.S. 1954); 74 S. Ct. 693 (U.S. 1954).
[2]Delaware, Kansas, South Carolina, Virginia.
[3]Bolling v. Sharpe, (D.C. D.C. 1951) not yet reported.
[4]Alabama, Arkansas, Arizona, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, Tennessee, Texas, West Virginia, Wyoming.
[5]175 U.S. 528 (1899).
[6]74 S. Ct. 686,691.
[7]*Id.* at 692.
[8]*Ibid,* footnote 11.

affected, particularly from the deep south, has been most vigorous.[9] In some of the other states affected and the District of Columbia the decision has been generally accepted and plans have already been presented to abolish segregation in all state schools in the forthcoming school year.[10]

Prior to the decision in the *Segregation Cases,* segregation in the public schools had been based upon the "separate but equal" doctrine.[11] As a result of the *Segregation Cases* this doctrine has been overruled as applied to public schools and segregation declared unconstitutional. In order to best understand the full affect of the *Segregation Cases* we must first understand the "separate but equal" doctrine and how it developed.

In 1896 there was argued before the Supreme Court of the United States the case of *Plessy v. Ferguson.*[12] This case arose in the state court of Louisiana and involved a state statute requiring separate accommodations for white and colored persons in coaches on railroads.[13] It was argued by the appellant in this case that the enforcement of this statute violated his constitutional rights under the 13th and 14th Amendments. Mr. Justice Brown delivered the opinion of the Court and stated:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."[14]

It was further stated in the opinion, concerning the exercise of the police power of the state, that:

> " . . . the case reduced itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion of the part of the legislature. In determing the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more

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[9]See New Republic, May 24, 1954; Business Week, May 22, 1954, p. 25; Newsweek, May 24, 1954, p. 25; Newsweek, May 31, 1954, p. 92; The Atlantic Monthly, July 1954, p. 33; Time, May 24, 1954, p. 21.

[10]See note 9 *supra.*

[11]This doctrine was established in the case of Plessy v. Ferguson, 163 U.S. 537 (1896).

[12]163 U.S. 537 (1896).

[13]La. Act No. 111 of 1890, p. 152—"Be it enacted by the General Assembly of the State of Louisiana, That all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure accommodations; . . . "

[14]163 U.S. 537, 544 (1896).

> obnoxious to the 14th Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."[15]

In concluding the opinion, Mr. Justice Brown states:

> "If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[16]

This is the case that established the "separate but equal" doctrine that was followed until May 17, 1954. The *Segregation Cases* first went before the Supreme Court in 1952.[17] The Court heard full argument by both sides on two different occasions during the almost two years that the cases were before them.

The first decision concerning the question of segregation in the public schools to come before the Supreme Court was in the case of *Cumming v. Richmond County Board of Education*.[18] Since that case was handed down in 1889, there have been but seven cases[19] involving a question concerning separate schools for the races before the Supreme Court, exclusive of the five *Segregation Cases*.

Let us review these cases in order that we might better consider the legal basis upon which the *Segregation Cases* rest.

The *Cumming* case[20] involved a suit brought by three Negroes against the Board of Education of Richmond County, Georgia. The Negroes complained that the Board of Education used funds in its hands to maintain a high school for white children without providing a similar school for colored children. The funds so held by the Board were collected by way of a tax under authority of an Act of the State of Georgia. The Board had authority under the Act "to establish schools of higher grades than those established by the local trustees, ordain their establishment to such as the interest and convenience of the people may in their judgment of this Board require." The Negroes maintained that as taxpayers they were being taxed to support schools wholly for the white children and sought an injunction against the Board. Mr. Justice Harlan speaking for the Court held that the problem was one belonging to the respective states, with which Federal authority would not interfere.[21]

Although the *Cumming* case is not on all fours with the *Segregation Cases*, it does illustrate the fact that in 1889, when the members of the Court were a part of the generation during which the problem was born, the Supreme Court refused to interfere with the decision handed down by the Georgia Supreme Court on the ground that it was not a "case of a clear and unmistakable disregard of rights secured by the supreme law of the land." At the time of the *Cumming* case the Georgia Constitution provided[22] for a public school system on the elementary level and for separate schools for the white and colored races.

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[15] *Id.* at 550.
[16] *Id.* at 551.
[17] 21 U.S.L. Week 3169.
[18] 175 U.S. 528 (1899).
[19] Berea College v. Kentucky, 211 U.S. 45 (1908); Gong Lum v. Rice, 275 U.S. 78 (1927); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. University of Oklahoma, 332 U.S. 631 (1948); Fisher v. Hurst, 333 U.S. 147 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).
[20] *Supra*, note 18.
[21] *Supra*, note 5.
[22] Ga. Const. Art. 8 § 1.

Nine years after the decision of the *Cumming* case the Supreme Court was again called upon to decide a case involving segregation in the schools. The case of *Berea College v. Commonwealth of Kentucky*,[23] involved a corporation created by the state for "owning, maintaining, and operating a college, school and institution of learning, known as 'Berea College'." The issue of the case involved a statute that prohibited a person or corporation from operating a college where both persons of the white and Negro races received instructions. The corporation (Berea College) was found guilty of violating the statute and was fined $1,000. On appeal to the Supreme Court the Court held that although a state could not assert such power over individuals, it could assert such a power over a corporation, which was created by the state. Although the majority opinion of the Court based its decision on the narrow grounds of whether a state can control a corporation that it had created, it is interesting to note the dissenting opinion of Mr. Justice Harlan, the same Justice that wrote the majority opinion in the *Cumming* case. In his dissent, Mr. Justice Harlan states:

> "If pupils, of whatever race—certainly, if they be citizens—choose, with the consent of their parents, or voluntarily, to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose."[24]

Mr. Justice Harlan further states in his opinion:

> "Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at public expense."[25]

The above cases do not touch the precise question presented in the *Segregation Cases,* but they do tend to illustrate the manner in which the Court regarded segregation in schools, even private schools, during the period when the purpose and intention of the 14th Amendment were still fresh in the minds of the American public.

In *Gong Lum v. Rice*,[26] the question involved was "whether a state can be said to afford to a child of Chinese ancestry born in this country and a citizen of the United States, equal protection of the laws by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races."[27] In the opinion of the Court delivered by Mr. Chief Justice Taft, the *Cumming* case was cited with approval.[28] The Court also said:

> "Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has many times decided to be within the constitutional power of the state legislature to settle without intervention of the Federal courts under the Federal Constitution."[29]

The next case concerning segregation did not appear before the Supreme Court until 1938 when the case of *Missouri ex rel. Gaines v. Canada*[30] was argued. This case presented the question of whether a state, that did not provide a separate law school for Negroes, and would not admit Negroes to the white law school offered

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[23]211 U.S. 45 (1908).
[24]*Id.* at 68.
[25]*Id.* at 69.
[26]275 U.S. 78 (1927).
[27]*Id.* at 85.
[28]*IId.* at 85.
[29]*Id.* at 85.
[30]305 U.S. 337 (1938).

equal protection of the law to a Negro by paying his tuition ot an out-of-state law school where he would be admitted. The court answered this question in the negative saying:

> "The basic consideration is not as to what sort of opportunities other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnished to white students and denies to Negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which it denies to Negroes by reason of their race. The white resident is afforded legal education within the state; the Negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another state does not remove the discrimination."[31]

The decision of this case marks the beginning of a new trend by the Supreme Court and lays the foundation upon which the issue of the *Segregation Cases* rests.

It should be noted at this point that the earlier cases by the Court were not based upon any issues concerning the equality of the separate schools but were concerned only with the constitutionality of segregation itself.

On January 12, 1948, the Supreme Court handed down its decision in the case of *Sipuel v. Board of Regents of the University of Oklahoma et al.*[32] The opinion of the Court in this case cites the *Canada* case and it is the only case relied upon by the Court.[33] The judgment of the Supreme Court of Oklahoma was reversed and a mandate was issued. The Court stated in its opinion that:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."[34]

One month and four days later the Court was called upon to determine whether the mandate issued by it had been complied with by the court of Oklahoma. The question was presented in the case of *Fisher v. Hurst, Chief Justice, et al.*[35] The Supreme Court of Oklahoma, in conformity with the mandate issued in the *Sipuel* case,[36] reversed the decision of the trial court and directed it to "take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and their opinion."[37] The trial court in conformity with this order issued a decree directing the Board of Regents to either:

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[31]*Id.* at 349.
[32]332 U.S. 631 (1948).
[33]*Id.* at 633.
[34]*Id.* at 632.
[35]333 U.S. 147 (1948).
[36]Sipuel v. Board of Regents of the University of Oklahoma, 332 U.S. 631 (1948).
[37]*Supra,* note 35, at 148.

> "(1) enroll plaintiff, if she is otherwise qualified, in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain on the same scholastic basis as other students thereof until such a separate law school for Negroes is established and ready to function, or
> "(2) not enroll any applicant of any group in said class until said separate school is established and ready to function."[38]

In determining the question presented, the Court concluded that the mandate had been complied with.

It should be noted that this decree was issued in the alternative leaving it up to the Board of Regents to admit the Negro or refuse to admit the whites. The Court refused to decide whether or not the manner in which the Oklahoma court issued this decree, satisfied their mandate, by stating that the question was not before them. There was a dissent by Mr. Justice Rutledge wherein he states:

> "It (the mandate) plainly meant, to me at any rate, that Oklahoma should end the discrimination practiced against petitioner at once, not at some later time, near or remote. It also meant that this should be done, if not by excluding all students, then by affording petitioner the advantages of a legal education equal to those afforded to white students. And in my comprehension the equality required was equality in fact, not in legal fiction."[39]

The next case to come before the Supreme Court involved the question of what constitutes equal facilities. The case of *Sweatt v. Painter et al.*[40] came before the Court in April of 1950 and the decision was handed down in June. Sweatt, a Negro, had applied for admission to the University of Texas Law School and was refused. However, he was offered enrollment in a separate law school for Negroes. The Court held that the legal education offered Sweatt was not substantially equal to that which was offered at the University of Texas, stating:

> "Such education is not available to him in a separate law school as offered by the state."[41]

This sentence by the Court goes further, in the opinion of the writer ,toward abolishing segregation than any other statement made by the Court in all the prior cases.

Another case, involving substantially the same question, was handed down on the same day with the *Sweatt* case. The case of *McLaurin v. Oklahoma State Regents for Higher Education et al.*[42] involved the question of whether a student who has been admitted to a graduate school can be segregated in his association with the other students. The Court held that to do so was to deprive the student of his rights to the equal protection of the laws. The Court stated:

> "Appellant, having been admitted to a state supported school, must receive the same treatment at the hands of the state as students of other races."[43]

From a review of the cases from *Cumming* to *McLaurin*, it is easy to see the progress that has been made by the Court in the field of narrowing segregation in the public schools.

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[38] *Supra*, note 35, at 149.
[39] *Supra*, note 35, at 151.
[40] 339 U.S. 629 (1950).
[41] *Id.* at 635.
[42] 339 U.S. 637 (1950).
[43] *Id.* at 642.

A review of the *Segregation Cases* at this point is necessary in order to understand what was sought to be accomplished by them and to understand the problems that still face the Supreme Court before handing down any decrees in the cases.

The case of *Brown v. Board of Education of Topeka*,[44] originated in the District Court of Kansas. The appellants were Negro students attending elementary school and their parents. The appellees were state officers. Appellants commenced this action for a judgment declaring unconstitutional a state statute authorizing cities of the first class to maintain separate schools for white and colored children in the grades below high school. The appellants contended that the Negro schools were inferior to those provided white children in the physical facilities, curricula, teaching resources, student personnel service as well as all other services and also "that apart from all other factors segregation in itself constitutes an inferiority in educational opportunities offered to Negroes and that all of this is in violation of due process." The District Court found the facilities of the different schools to be comparable and on the basis of the *Plessy*[45] and *Gong Lum*[46] cases refused to grant relief.

The case of *Briggs v. Elliott*[47] originated in the three-judge District Court of South Carolina. Appellants were Negro children who were eligible to attend public schools in South Carolina and their parents. Appellees were public school officials of the state. Suit was commenced to enjoin enforcement of the state constitution and statutes which required segregation of races in the public schools,[48] on the ground that they denied to appellants the equal protection of the law secured by the Fourteenth Amendment, and for a judgment declaring:

> ". . . that segregation of the races in the public schools . . . is of itself a denial of the equal protection of the laws."[49]

The school officials maintained that the constitutional and statutory provisions were a reasonable exercise of the police power of the state. The district court found the facilities of the separate schools not equal and issued an injunction directing appellees to promptly furnish Negroes in the district educational facilities and opportunities equal to those furnished white persons and to report within six months to the court what action had been taken. The court refused to grant an injunction to abolish segregation. There was in this case a dissenting opinion by Judge Waring in which he expressed the opinion that "Segregation is *per se* inequality."[50] This case was appealed in July, 1951 and the report required by the court by the decree was filed in December, 1951 and was forwarded to the Supreme Court. The Supreme Court remanded the case for the purpose of obtaining the view of the district court on the additional facts in the record and to give it the opportunity to take such action as it deemed appropriate, Mr. Justice Black and Mr. Justice Douglas dissenting.[51]

On the second hearing of the case[52] the Court entered a final decree ordering the appellees to promptly furnish to Negroes within the district equal educational facilities and opportunities to those offered white persons. The court again refused to issue an injunction abolishing segregation.

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[44]98 F. Supp. 797 (1951).
[45]Plessy v. Ferguson, 163 U.S. 537 (1896).
[46]Gong Lum v. Rice, 275 U.S. 78 (1927).
[47]98 F. Supp. 529 (1951).
[48]See South Carolina Const. Art. 11, § 7 and South Carolina Code § 5377 (1942).
[49]*Supra*, note 47, at 531.
[50]*Supra*, note 47, at 548.
[51]Briggs v. Elliott, et al, 342 U.S. 350 (1952).
[52]103 F. Supp. 920 (1952).

The case of *Davis v. County School Board of Prince Edwards County*[53] originated in the district court of Virginia. The case was substantially on all fours with the *Elliott* case in both facts and contention. The court found facilities in the Negro schools not equal to those of the white schools and issued an injunction directing the appellees to provide substantially equal curricula and facilities for Negro students. The court refused to enjoin enforcement of the state segregation provisions.

The case of *Gebhart v. Belton*[54] originated in the Court of Chancery of the State of Delaware. Respondents were Negro children seeking admittance to two public schools maintained by petitioners for white children. Respondents contended that:

> "(1) State imposed segregation in education is itself in violation of the Fourteenth Amendment, and (2) the facilities and educational opportunities offered to the plaintiffs, and those similarly situated are inferior to those available to white students similarly situated."[55]

The court held that segregation in itself was not unconstitutional, but did not find that facilities and opportunities were equal and issued a decree "preventing the defendants and their agents from refusing these plaintiffs" admission to the white school because of their color. On appeal to the Supreme Court of Delaware, the Court affirmed the judgment of the Court of Chancery on substantially the same grounds reached by the Chancellor.[56]

The fifth case, *Bolling v. Sharpe*,[57] originated in the District Court of the District of Columbia. This case differed from the other four cases in that the argument of the appellants was based upon the contention that segregation of white and Negro children in the District of Columbia was unconstitutional under the Fifth Amendment of the Constitution and was in violation of the Civil Rights Acts and the United Nations Charter. Although this case was heard by the Supreme Court along with the other four cases, it will not be further considered in this article for the reason the decree that will eventually be handed down by the Supreme Court in this case will have no effect upon the states.

The grounds for appeal in the cases, although different in their particulars, were substantially the same and can be summarized as follows:[58]

That the lower courts erred:

(1) In refusing to grant plaintiffs a permanent and an immediate injunction to restrain state officials from acting pursuant to state constitutions and/or statutes under which they are maintaining separate public schools for Negro children solely because of their race. (This was not a ground of appeal by the plaintiffs in the *Gebhart* case since this relief was granted by the lower court in that case.)
(2) In refusing to declare that segregation in public schools is *per se* unconstitutional.

The Negroes in these cases were basing their arguments and relying primarily upon the *McLaurin* and *Sweatt* cases[59] and urging the Court to overrule the "separate but equal" doctrine handed down in the *Plessy* case.[60] They contended that separation of the Negro in the public schools places upon him an inferior status and causes

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[53]103 F. Supp. 337 (1952).
[54]87 A. 2d 862 (1952).
[55]*Id.* at 863.
[56]91 A. 2d 137 (1952).
[57]D.C. Dist. Col., April 9, 1951 (not yet reported).
[58]This summarization is made from the assignment of errors as set forth in the brief filed by the appellants in the four state cases involved.
[59]See page 16 of brief of the appellants.
[60]See page 17 of brief of the appellants.

the Negro to be held in disrepute by other members of society.[61] They also contended that the classification of citizens by race is an unreasonable and unwarranted classification and has no legal or scientific basis. The States relied primarily upon the "separate but equal" doctrine handed down in the *Plessy* case[62] and other cases that have followed that doctrine. Also they contended that segregation was a reasonable exercise of the public power of the state to manage domestic affairs of the state concerning "health, safety. morals and general welfare."[63]

In states affected by the decision in the *Segregation Cases* plans are being proposed to accept the decision in some of the states and circumvent it in others. In a few of the states[64] there should be little if any problem in switching over to a system of integration. In a majority of the states,[65] based upon the reaction to the decision by state officials at the present time, the decision and ultimate decree of the Court will be accepted and a system of integration will be developed. It appears, however, that such systems will be gradual and will take a number of years. In the states in the deep south it appears that every attempt will be made to maintain segregation and in these states the real fight to maintain segregation will be fought.

The reaction to the decision varied in the different states. In North Carolina one of the first reactions concerning the decision came from Greensboro. The school board of that city passed a resolution instructing the superintendent of city schools to report on ways and means of complying with the Court's decision.[66] In Texas the Commissioner of Education stated that state funds would continue to be distributed on a basis of separation of the races and Governor Shivers called for a slow transition.[67] In Louisiana the House of Representatives went on record urging action to retain segregation.[68] The District of Columbia took immediate steps to rule out all racial discrimination in connection with "students, teachers, and school facilities."[69] In Alabama a plan is being promoted to have the legislature pass a bill giving school boards authority to transfer a pupil from one school to another "to promote the best interest of education."[70] In Virginia it is being suggested that the compulsory school laws be repealed so to leave the problem with the parents of the school children whether they would send their children to segregated schools.[71] In Mississippi it was first believed that segregation could be maintained on a voluntary basis, on the assumption that ninety per cent of the Negroes in the state wanted to continue segregation. This plan was short lived when leaders of the Negro race, meeting with Governor White and other state leaders, rejected the plan and asked for immediate integration into the public schools. Mississippi at the present time is working for a constitutional amendment to permit the abolition of the public school system on a county option basis.

In view of the reaction in the south to the decision together with the social conditions and traditions of the southern people it appears inevitable that litigation

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[61]For a discussion on this point see, Grade School Segregation: The Latest Attack on Racial Discrimination, 61 Yale Law Journal 730 (1951-52).

[62]Plessy v. Ferguson, 163 U.S. 537 (1896).

[63]See argument before Supreme Court reported 21 U.S.L. Week 3161, 22 U.S.L. Week 3157.

[64]Arizona, Kansas, Missouri, New Mexico, West Virginia, and Wyoming.

[65]Arkansas, Delaware, Florida, Kentucky, Maryland, North Carolina, Oklahoma, Tennessee, Texas, and Virginia.

[66]Newsweek, May 31, 1954, p. 31.

[67]*Ibid.*

[68]*Ibid.*

[69]Newsweek, May 31, 1954, p. 31; Business Week, May 22, 1954, p. 25-6.

[70]Business Week, May 22, 1954, p. 25-6.

[71]*Ibid.*

in the courts of the states and the United States will delay integration of the races for many years to come. In the opinion of the writer the words of Mr. Justice Brown: "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane," in the *Plessy* case are as true today as when written in 1896, anything in the *Segregation Cases* to the contrary notwithstanding.

RECENT DECISIONS

Future Interest Executory Devises Versus Remainders

James Munroe Cole devised a portion of his property to John Cole, another portion of it to Willie Cole, and a third part to John and Willie Cole as tenants in common.[1] The testator directed "that in case of the death of Willie Cole without issue that all property which he may have received from my estate shall go to John A. Cole in fee simple." After the testator's death, Willie Cole died without issue, and the heirs of John Cole brought this suit to quiet title, defendants claiming title through a deed of trust given by Willie Cole. Held: John Cole acquired a vested interest in the contingent remainder, which was subject to be divested by death of Willie Cole at any time with issue surviving, thus giving the plaintiff a good title to the land given to Willie Cole in fee simple. *Hayes v. Cole,* 73 So. 2d 258 (Miss. 1954).

It is a well established rule of property that a remainder can only be preceded by one or more estates of lesser quantum than a fee simple absolute, fee simple determinable, or fee simple conditional,[2] and that the remainder takes effect in possession or enjoyment at the termination of the prior estate.[3] This is true of all remainders whether they are vested or contingent. An indefeasibly vested remainder is one certain to take effect in enjoyment or possession at the termination of the prior estate.[4] A vested remainder subject to open is a gift to a class which is likely to increase.[5]

Whenever the remainder is ready to take effect in possession or enjoyment at the termination of the prior estate, but may fail either before, at, or after the termination of the prior estates, it is called a vested remainder subject to divestment, and the contingency on which it might fail is called a condition subsequent.[6] If the condition must happen before the remainderman can take possession, or the remainderman has not been ascertained, then the remainder is generally construed as con-

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[1]In the companion case, Joyner v. Cole, 73 So. 2d 264 (Miss. 1954), the same plaintiffs brought action against other defendants, who also derived their title through Willie Cole's deed of trust, for possession of the land which John and Willie Cole shared as tenants in common. Shortly after the death of the testator, however, a court decree was entered for partition of the land. The court in this case held that John Cole and his heirs were estopped to assert that Willie Cole did not have a fee simple absolute by the partition decree.

[2]American Law of Property § 4.27 (1952); Restatement, Property § 156 (1936); Simes, Law of Future Interests § 51, 154 (1936).

[3]American Law of Property § 154 (1952); Restatement, Property § 156 (1936); Simes, Law of Future Interests § 154 (1936).

[4]A, owning Blackacre in fee simple, transfers it to B for life, remainder to C and his heirs is an example of this type of remainder. American Law of Property § 4.33 (1952); Restatement, Property § 157 (1936).

[5]A owning Blackacre in fee simple transfers it to B, remainder to the children of B; B has a child, C; C has a vested remainder subject to open and admit other children of B. American Law of Property § 4.34 (1952); Page, Wills § 1115 (1928); Restatement, Property § 157 (1936); Simes, Law of Future Interests § 57 (1936).

[6]An example is A, owning Blackacre in fee simple, gave the land to B for life with power for disposal of the fee simple, remainder to C and his heirs. B has a life estate with power to sell the fee simple and C has a vested remainder subject to divestment if B sells the fee simple. American Law of Prfperty § 4.35 (1952); Restatement, Property § 157 (1936); Simes, Law of Future Interests § 60 (1936). For a complete discussion of the contingencies creating estates vested, subject to complete defeasance, read the annotations in 13 A.L.R. 712.

tingent and the condition as precedent.[7] To hold as the court did in the instant case that a person had a vested interest in a contingent remainder is an ambiguous statement because the question of whether the interest is vested or contingent is undecided.[8]

Since the first taker took a fee simple in the present case, there can be no remainder.[9] In modern times and at common law there can be no remainder following a fee simple estate; but since the passage of the Statute of Uses and the Statute of Wills, future interests in a fee simple estate can be created by means of an executory limitation.[10] This type of limitation can be distinguished from a remainder in that it cuts off a vested interest when the condition occurs in derogation of the vested estate of freehold.[11] A common illustration is a devise to A and his heirs but if A marries B, then to C and his heirs in fee simple. Such a devise gives A a defeasible fee simple and C an executory devise. If A marries B, then A's estate is cut off by C's immediate right to possession. In a remainder such as to B in fee simple after the life estate of A, B's right to possession does not mature until the death of A.

In previous cases the Mississippi Court has held that a limitation to take effect on the death of the fee simple owner without issue is an executory limitation, and that the estate of the fee simple owner is a defeasible one.[12] A common example of a defeasible fee simple subject to an executory limitation is a gift to A and his heirs, and if A dies without issue surviving, to B and his heirs. By holding the limitation in the principle case to be an executory devise, the same result would have been reached without the court having to classify the *remainder* or to decide whether the *remainder* had lapsed.

Section 837 of the MISSISSIPPI CODE (1942) states that unless the intention of the parties is otherwise expressed, every contingent limitation made to depend on the dying to take effect when such person dies without issue surviving him at the time of his death. The purpose of this statute is to change the common law ,which would interpret limitations dependent on death without issue to mean an indefinite failure of issue. The statute means to interpret such limitatio to mean a definite failure of issue.[13] By applying this statute to the principal case, the phrase, "death without issue," would mea nthe death of Willie Cole without issue, rather than the death of any of his descendants, thus bringing the executory devise within the period of the rule of perpetuities. The statute also effectuates the limitation over to John Cole even if Willie Cole had issue which predeceased him.[14] *Dorothy Clower*

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[7]A common illustration is A, owning Blackacre in fee simple, transfers it to B for life, remainder to C and his heirs if C should attain the age of twenty-one. C is ten. Before C has a vested interest, he must reach twenty-one, and the uncertainty of his doing so renders the remainder contingent AMERICAN LAW OF PROPERTY § 4.36 (1952); PAGE, WILL- § 1008 (1928; RESTATEMENT, PROPERTY § 157 (1936);SIMES, LAW OF FUTURE INTERESTS § 58 (1936). See note 131 A.L.R. 720 for a complete discussion of the conditions precedent which renders a remainder contingent.

[8]Decisions that have held that a limitation is a vested interest in a contingent remainder generally mean that the contingent remainder is alienable or assignable. Belcher v. Burnet, 126 Mass. 230 (1879); Brown v. Tucker, 255 Mass. 237, 1751 N.E. 311 (1926); Love v. Lndstedt, 76 Ore. 66, 147 Pac. 935 (1915); Banks' Will Case, 87 Md. 425, 40 Atl. 168 (1898).

[9]See Note 1, *Supra.*

[10]AMERICAN LAW OF PROPERTY § 4.35 (1952); POWELL, REAL PROPERTY § 178 (1950); SIMES, LAW OF FUTURE INTERESTS § 149 (1936); TIFFANY, REAL PROPERTY § 356 (1939).

[11]American Christian Missionary Society v. Tate, 198 Ky. 621, 250 S.W. 483 (1923); Bradford v. Mackenzie, 131 Md. 330, 101 Atl. 774 (1917); Spann v. Carson, 123 S.C. 371, 116 S.E. 427 (1923).

[12]Jordan v. Roach 32 Miss. 481 (1856); Armstrong v. Thomas 112 Miss. 272, 72 So. 1006 (1916); Crump v. Phelps 207 Miss. 682, 43 So. 2d 105 (1949): White v. Inman, 212 Miss. 237, 54 So. 2d 375 (1951); Sims v. Conger, 39 Miss. 231 (1860).

[13]White v .Inman, *supra,* note 12; RESTATEMENT, PROPERTY § 266 (Supp. 1948).

[14]Busby v. Rhodes, 58 Miss. 237 .1880).

TORTS—STRICT LIABILITY—DOG OWNER HELD LIABLE DESPITE INVITEE'S FAILURE TO HEED ADMONITIONS

Action was brought by a dinner guest against her host for injuries sustained as a result of being bitten by host's house pet, a cocker spaniel described as "angelic looking" but "snappy." On one previous occasion the dog had bitten a person. Shortly after her arrival plaintiff was warned that the dog was neurotic and not to be patted. Despite such warning, plaintiff, while awaiting dinner, persisted in playing with the dog. Later, while seated at the dinner table, plaintiff continued bestowing attention upon the dog, and offered it a bit of cheese. The dog, apparently having wearied of the display of affection, declined the cheese, and nipped, instead, the nose of the plaintiff. HELD: Because the dog had once bitten a person, the defendant was negligent in failing to restrain it, and plaintiff is entitled to damages in the amount of $7,500. *Coleman v. Blake,* 128 N.Y.S.2d 780 (N. Y. 1954).

Strict liability for damage such as that in the instant case rested originally upon the theory that the mere keeping of the animal constituted negligence per se.[1] Such a theory utterly fails, however, to coincide with the modern concept of negligence as conducted which is unreasonable in view of the risk.[2] The mere keeping of a dog cannot be termed unreasonable conduct, nor can a dog be generally regarded as inherently dangerous. At common law, dogs were regarded as ordinarily harmless animals,[3] and the dog owner incurred no liability if the dog was rightly in place when the mischief was done, unless it appeared that the animal was vicious ,and that such fact was known to the owner.[4]

The vicious nature or character of a dog is significant as a basis of fault for imposing responsibility on an owner for injuries caused by a dog.[5] The term "vicious" connotes savagery and ferociousness.[6] The cocker spaniel in the subject case was described as "neurotic." There is, it would seem, an obvious distinction between a dog of vicious nature and one of neurotic nature.

After erroneously assuming that all neurotic dogs are vicious, the court apparently proceeded upon the somewhat fallible theory that in all such cases liability inevitably attaches. Such a theory is apparently predicated upon the purported corollary to the ancient and oft-repeated maxim that every dog is entitled ot one bite,[7] the illogical corallary being, of course, that the owner is to be held liable for the second bite, regardless of attendant circumstances. The court appears oblivious to the overlapping of the defenses of assumption of risk and contributory negligence in the subject case.

Even before the first appearance of the assumption of risk doctrine,[8] and likewise before the earliest recognition of contributory negligence as a defense,[9] recovery was denied one bitten by a dog because of the fact that the bite resulted from an act of the plaintiff.[10] Much later, in the celebrated case of *May v. Burdett,*[11] in which appears for the first time the modern concept of strict liability in animal cases,

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[1] 3 BL COMM 211; 2 COOLEY, TORTS. ch. XI (3d ed. 1906).
[2] PROSSER, LAW OF TORTS 347 (1941).
[3] Splaine v. Eastern Dog Club, 306 Mass. 381, 28 N.E.2d 450 (1940).
[4] *Ibid.*
[5] Tillman v. Cook, 3 So.2d 230 (La. 1941).
[6] Melicker v. Sedlacek, 189 Iowa 946, 179 N.W. 197 (1920).
[7] Burton v. Moorhead, 8 Sess. Cas., 4th. Ser., 892 (1881).
[8] Cruden v. Fentham, 2 Esp. 685 (1799).
[9] Butterfield v. Forrester, 11 East. 60, 103 Eng. Rep. 926 (1809).
[10] Brock v. Copeland, 1 Esp. 203 (N. P. 1794).
[11] May v. Burdett, 9 Q.B. 101, 16 L.J.Q.B. 64 (1846).

the court states that there could be no recovery if the injury resulted from the willfullness of the plaintiff after having been warned.

That the court, in the subject case, may have been guilty of blind adherence to a dogmatic misconception is indicated by the fact that it cited, in support of its decision, cases which are readily distinguishable from the subject case, e.g., a case in which the dog was a large and ferocious Siberian bloodhound, kept purely for the purpose of protection against thieves,[12] and other cases equally distinguishable.[13]

It thus appears that the subject case contains a generous measure of illogical reasoning. It also seems that the court failed to confine its manifestations of generosity to the matter of illogical reasoning, as indicated by the fact that damages were awarded in the amount of $7,500. While the award may or may not have been excessive, it is sufficiently large to become interesting when compared with awards in cases of similar nature, e.g., a case in which an award of $1,800, while not held excessive, was described by the appallate court as "large," although the plaintiff's upper lip was torn away by a vicious dog which was deliberately thrust at her by the defendant after she had refused to pet it.[14]

Ralph White

STREAM POLLUTION—RIGHTS OF RIPARIAN LANDOWNER

The defendant, without negligence, deposited small amounts of salt and oil from its refinery into a creek, which subsequently ran through plaintiff's land, consisting of 187½ acres, part of which had been developed into permanent pasture. The deposits made by the refinery resulted in limited temporary damage to certain portions of the plaintiff's undeveloped land. HELD: Despite lack of negligence on the part of the defendant, plaintiff, as a riparian owner, was entitled to recover for injury caused by pollution to the extent of the decrease in the rental value of the land caused thereby during the time of ownership,[1] and to the extent the injury should find that the defendant had caused the pollution. *Southland Co. v. Aaron,* 72 So.2d 161 (Miss. 1954).

The rule is well settled that a landowner has certain riparian rights to and in the water on, adjoining, or passing through his land. Among these is the right to have the water come to him in its usual pure, usable and desirable state, free from pollution or corruption.[2] As a corollary, it is the general rule than any form of pollution by an upper riparian owner, causing damage to a lower riparian owner will give rise to a right of action in such lower riparian owner for damages,[3] injunctive relief,[4] or possibly both.[5]

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[12]Muller v. McKesson, 73 N.Y. 195 (1878).

[13]Lynch v. McNally, 73 N.Y. 347 (1878); Lovell v. Haas, N.Y.S.2d 886 (1941).

[14]Ingeneri v. Kluza, 129 Conn. 208 (1942).

[1]The court explained that when injury is temporary in nature, damages for pollution will be limited to the amount of the diminution of rental value, while if the injury is permanent the decrease in market value may be used for the scale of damages.

[2]3 COOLEY, TORTS § 421 (1932); AM. JUR., WATERS § 405; Atlanta and Birmingham Air Line Ry. v. Wood. 160 Ala. 657, 49 So. 426 (1909); American Sand and Gravel Co. v. Rushing, 183 Miss. 496, 184 So. 60 (1938); Squaw Island Freight Terminal Co. v. City of Buffalo, 273 N.Y. 119, 7 N.E.2d 10 (1937).

[3]Masonite Corporation v. Steede, 198 Miss. 530, 21 So.2d 463, *Sug. error overr. in part sustained in part,* 198 Miss. 530, 23 So.2d 756 (1945); Mississippi Mills v. Smith, 69 Miss. 299, 11 So. 26 (1892).

[4]Indianapolis Water Co. v. American Strawboard Co., 57 Fed. 1000 (C.C.D.Ind., 1893); Cairo Pickle Co. v. Muggridge, 206 Ga. 80, 55 S.E.2d 562 (1949).

[5]American Tar Products Co. v. Jones, 17 Ala. 841, 86 So. 113 (1920); Wright v. Best, 19 Cal.2d 368, 121 P.2d 702 (1942).

Nevertheless, the wide diversity of interests which has developed in our country has prompted some jurisdictions to partially qualify the riparian landowner's right to water of substantially unaltered quality. The principles utilized to so qualify the right are various. Finding widest acceptance and application is the "reasonable use" doctrine, which allows proper and reasonable domestic or commercial use of waters even though purity is thereby destroyed.[6] Some states in the far west[7] adopted the so-called "prior appropriation" doctrine whereunder one's rights to use water may be superior to another depending upon the previous appropriation for a certain purpose.[8] Finally, and in more recent years, the "public interest"[9] and "useful industry"[10] doctrines have been put to limited use in curtailing the common law riparian rights.

Notable in the subject case is the fact that the court apparently ignored the great contrast in the interests of the parties. In *Mississippi Mills v. Smith*,[11] the Mississippi Supreme Court held that it would not apply a different rule concerning pollution of manufacturing establishments, even though industry may be highly desirable and to the "public interest" in the state. In the same case, the court briefly mentioned that a riparian owner has a right to a "reasonable use" in a stream, but went on to state that such right would not include the right to discharge foreign matter (except, perhaps, other water in its natural state) into the stream and thereby cause pollution and injury.[12] It thus appears that for most purposes the "reasonable use" doctrine will not find application in Mississippi.[13] In a later decision, our supreme court went so far as to imply that every case of pollution is, within itself, a nuisance to a riparian owner.[14]

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[6]56 Am. Jur., Waters § 407; Sandusky Portland Cement Co. v. Dixon Pure Ice Co., 221 Fed. 200 (7th Cir. 1915). However, even reasonable use which causes substantial injury to another riparian owner may give rise to a cause of action where the "reasonable use" doctrine is recognized. Packwood v. Mendota Coal and Coke Co., 84 Wash. 47, 146 Pac. 163 (1915).

[7]Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming. See Note, 84 U. of Pa. L. Rev. 630, 631 (1936).

[8]Oppelander v. Left Hand Ditch Co., 18 Cal. 142, 31 Pac. 854 (1892). The "prior appropriation" doctrine acts as a substitute for common law riparian rights; but unlike the riparian landowner, the "appropriator's" rights to the water are forfeited by non-use.

[9]Montgomery Limestone Co. v. Bearden, 256 Ala. 269, 54 So.2d 571 (1951); Elmore v. Ingalls, 245 Ala. 481, 17 So.2d 674 (1944); City of Valparaiso v. Hagen, 153 Ind. 337, 54 N.E. 1062 (1899). In the last case cited, municipal sewage, even thought causing pollution, was regarded as serving a public interest, but the weight of authority holds the municipal corporation liable for such pollution. See Markwardt v. City of Guthrie, 18 Okla. 32, 90 Pac. 26 (1907).

[10]This doctrine has been applied exclusively in Pennsylvania where coal, stone and oil companies have found great favor with the courts and have been allowed, in the absence of negligence or malice, to pollute the streams of the state. See Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453 (1886); Alexander v. Wilkes-Barre Coal Co., 254 Pa. 1, 98 At. 794 (1916); Hauck v. Pipe Line Co., 153 Pa. 366, 26 Atl. 644 (1893). An abandonment of this doctrine in the state of its origin is indicated in Pennsylvania R. Co. v. Sagamore Coal Co., 281 Pa. 233, Atl. 368 (1924).

[11]69 Miss. 299, 11 So. 26 (1892).

[12]In making this pronouncement, the court distinguished Pennsylvania Coal Co. v. Sanderson, *supra* note 10, by showing that even though the water discharged from the coal mines was injurious, it was in its natural state, and, being so. its discharge may be a reasonable use; however, the water from Mississippi Mills Co. had been changed from its natural state by its use in washing dye closets, and so, the pollution could not be reasonable.

[13]This conclusion is supported in the subject case by the fact that testimony showed that the defendant used reasonable refining methods and took precautions to prevent injurious substances from flowing into the creek which passed through the plaintiff's land.

[14]"A stream wholly on the lands of another which has been polluted by the owner or any other person is not a nuisance per se to one who is not a riparian owner . . . " Masonite Corporation v. Burnham, 164 Miss. 840, 859, 146 So. 292, 296 (1933).

The subject case derives further interest not from the fact that recovery was allowed for damages resulting from pollution, but from the fact that it was granted on the basis of nuisance even though negligence was alleged but not proved. The court pointed out that negligence is not an element of nuisance[15] and if a nuisance is shown, proper relief will be granted therefor although only negligence is alleged. Of course, injury or threatened injury must, in every case, be shown to prove a nuisance warranting recovery.[16] The nuisance theory is the most frequently theory for recovery in pollution cases inasmuch as pollution is uniformly treated as such a tort.[17]

Therefore, under decisions to date in Mississippi, recovery may be had for any pollution or corruption of water caused by an upper riparian owner, which results in injury to a lower riparian owner, regardless of negligence, reasonableness of use of the public interest in either party. In essence, this amounts to strict liability. The Mississippi Supreme Court makes it clear that the landowner's common law rights will not be forgotten, even to the vexation of industry which has found aid and encouragement in the state.

Charles K. Pringle

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153 COOLEY. TORTS § 399 (1932); 66 C.J.S., NUISANCES § 11c.

1639 AM. JUR., NUISANCES § 26.

173 COOLEY, TORTS § 421 (1932); JOYCE, NUISANCES § 269 (1906); BL. COMM. 610 (Gavit's ed. 1892); 3 FARNHAM, WATER AND WATER RIGHTS § 446 (1904).

A few jurisdictions, notably Illinois, Kentucky, Oklahoma, and Texas, have required a showing of negligence when allowing recovery for pollution caused by emissions of salt water from oil well operations. One jurisdiction (Oklahoma) has, in a few recent cases, followed a theory of absolute liability in allowing recovery for pollution. *See* 3 OIL AND GAS REPORTER 831.

RECENT BOOKS

SEARCH, SEIZURE, AND ARREST IN MISSIPPIPPI. By Clarence Chase.

Booneville, Mississippi, Milwick Printing Company, 1953, pp. 452.

This is another and welcome work of a Mississippi author enlarging the number of books in specialized fields of Mississippi law. Every general practitioner who must daily range the entire field of law is becoming more and more aware of the practical advantage of quick reference manuals, particularly those which have emphasized the law of this state.

Mr. Chase has dealt almost exclusively with the law of Mississippi, chronologically establishing the law of search, seizure, and arrest through the constitution, statutes, and decisions of the Supreme Court of Mississippi. This he has done in a highly commendable manner with particular attention to detail. His format wastes no words. Each sub-title proposes a legal question followed immediately by the author's succinct answer to the question and the question and the reasons therefor as devolved from the constitution, statutes, and precedents of our Court. This is followed in each instance by short and excellent briefs of the leading cases having to do with the legal problem involved.

The subjects of this book are logically and practically entwined so that they conveniently lend themselves to an orderly discussion from the inception of the idea of a search, a seizure, or an arrest to the conclusion of the defendant's trial. The author has treated his subjects in the following principal sections and in the order shown: 1. The basic law—constitution and statutes. 8. Taking the affidavit and issuing the search warrant. 3. Form and contents of the affidavit and search warrant. 4. Serving the search warrant. 5. Making the search, seizing the goods, and arresting the offender. 6. Construction and application of the law. 7. Practice and procedure at the trial. 8. And, the miscellaneous law and decisions under the following subsections: (a) The trial court's arrest of palpable perjurers. (b) Rewards for the arrest of fleeing homicides. (c) Vehicles seized in liquor traffic. (d) And seizure of animals for dipping, etc.

The final chapter is a very excellent resume of all that has gone before succinctly stating the law in 1-2-3 order. Mr. Chase is particularly adept in digesting and collating this law in very brief but virtually all inclusive sentences and paragraphs.

This book is therefore highly recommended to bench and bar as a trial manual and as an immediate reference in the law office. It will prove a valuable and useful addition to every law library in Mississippi.

*JOHN S. THROOP, JR.**

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BOOKS RECEIVED

The Middle East—Problem Area in World Politics. By Halford L. Hoskins. New York, The Macmillan Company, 1954, pp. 311. $4.75.

Management in the PUBLIC SERVICE—The Quest for Effective Performance. By John D. Millett. New York 36, N. Y. McGraw-Hill Book Company. Inc., 1954, pp. 417. $5.50.

Hugh Roy Cullen—A Story of American Opportunity. By Ed Kilman and Theon Wright. New York, Prentice-Hall, Inc., 1954, pp. 376. $4.00.

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